89-1804
No. 89-___

FILED
MAY 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

JAMES J. CORRIGAN, JR., SALVATORE AVELLINO, VITO BIONDO, CHARLES CANNIZZARO, NICHOLAS FERRANTE, PETER FINNERTY, JOHN HAYNES, VINCENT MONTESANO, ARTHUR ROMERSA, THOMAS RONGA, FRANCO ROTUNDO, ROBERT SCHUMAN AND ANTHONY VESPUCCI,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

CARL J. HARTMANN, III,
Counsel of Record

A. JEFFREY WEISS, ESQ.
JUDD S. CONWAY, ESQ.
PAUL J. RUSKIN, ESQ.
A.J. WEISS & ASSOCIATES
425 Park Avenue
26th Floor
New York, New York 10022
Telephone: (212) 725-6327

Attorneys for the Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTION PRESENTED FOR REVIEW

Where 18 U.S.C. Section 2516(2) authorizes the States to enact statutes allowing "*the* principal prosecuting attorney" of a State . . . to make application to a State Court Judge . . . for an order" authorizing a wiretap interception, did the New York State Court of Appeals err in affirming Petitioners' convictions by upholding an application not submitted by the State Attorney General, but rather by an unelected official who was an autonomous, second "principal prosecuting attorney" for the State?

II. LIST OF ALL PARTIES BELOW

Prosecution

This case has been prosecuted at all levels by the New York State Organized Crime Task Force for the People of the State of New York.

Defendants

Those defendants who were parties to proceedings before the New York State Court of Appeals are set forth below. Defendants are divisible into two groups: (1) individual Defendants-Appellants below, all of whom are Petitioners herein, and (2) corporate entities, all of which have chosen not to seek a Writ of Certiorari.

Those individuals who were parties below, and are Petitioners herein are: James J. Corrigan, Jr., Salvatore Avellino, Vito Biondo, Charles Cannizzaro, Nicholas Ferrante, Peter Finnerty, John Haynes, Vincent Montesano, Arthur Romersa, Thomas Ronga, Franco Rotundo, Robert Schuman and Anthony Vespucci.

Those corporate entities which were parties to the proceedings below, but are not Petitioners herein are: Wayside Carting, Inc., Detail Carting Company, Standard Commercial Cartage, Inc., Jamaica Ash & Rubbish Removal, Inc., MCM Sanitation Corp. d/b/a Island Carting, Enviro Carting Corp. d/b/a Island Carting Salem Sanitary Carting Corporation, Sail Sanitation, Sanicare, Unique Sanitation, Vinnie Monte's Waste System, Inc., and the Private Sanitation Industry Association of Nassau/Suffolk, Inc. As per Rule 29.1, *Rules of the United States Supreme Court*, all parent companies and subsidiaries are set forth above.

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V. OPINIONS BELOW

Judgments of conviction against Petitioners were entered upon pleas of guilty[1] in the Supreme Court of the State of New York, Suffolk County, following the denial of their *Motions to Suppress* as to wiretap information obtained pursuant to the application of the Director of the Organized Crime Task Force ("OCTF"). Therein, Petitioners contended such information was obtained by the State in violation of *18 U.S.C. Section 2516(2)*. Appeals were taken to the Appellate Division of the Supreme Court of the State of New York, Second Department; said appeals being denied on December 30, 1988. On February 17, 1989, leave was granted to present the issue discussed herein before New York State Court of Appeals. In said appeal, decided on February 15, 1990, that Court, with a dissenting opinion, denied the appeal, affirming the Petitioners' convictions. The matter was then returned on Remittitur to the Supreme Court of the State of New York, Suffolk County.

On May 10, 1990, Petitioner Corrigan submitted an Application to Mr. Justice Marshall, as Circuit Justice, for a Stay Pending Petition for a Writ of Certiorari, following the denial of a similar motion by the New York State Court of Appeals on March 23, 1990. Said Application is presently pending. He is the only Petitioner whose circumstances presently require such an Application.

VI. JURISDICTION

i. Date of entry of opinion Below

The Opinion of the New York State Court of Appeals was entered on February 15, 1990.

ii. No rehearing or extension

No re-hearing or extensions have been sought by any party in this matter.

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[1] Except as to Petitioner Peter Finnerty who proceeded to trial.

iii. Not under Rule 12.3 (Not cross-petition)

This is not a Cross-Petition, and Petitioners hereby assert that they know of no party who intends to file such a petition, thus the provisions of Rule 12.3, *Rules of the U.S. Supreme Court*, do not presently apply.

iv. Statutory provision allowing review

Petitioners appeal from the final decision of the New York State Court of Appeals as to the application of a federal statute. As such is the case, and because this Petition arises out of the "final judgment . . . rendered by the highest court of a state in which a decision could be had", review is sought pursuant to 28 U.S.C. section 1257(a).

VII. STATUTES INVOLVED

The following federal statutes are involved in this Petition:

A. *Primary Statute*: 18 U.S.C. Section 2516(2)[2]

B. *Related Statute*: 18 U.S.C. Section 2516(1)

The following New York State statutes are involved in this Petition:

A. *Related Statute*: N.Y. Crim. Proc. (McKinney), Section 700.05[3]

B. *Related Statute*: N.Y. Exec. Law (McKinney), Section 70-a[4]

VIII. STATEMENT OF THE CASE

i. Statement of the Case

Petitioners, along with a number of other defendants, were indicted on September 10, 1984. Criminal

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[2] *See* Appendix at 55.

[3] *See* Appendix at 71.

[4] *See* Appendix at 79.

proceedings were initiated in the Supreme Court of the State of New York, Suffolk County. Following the denial of their *Motions to Suppress* evidence obtained by wiretaps, and upon the entry of pleas of guilty[5], all defendants were convicted, and thereafter sentenced. All but three of the Petitioners[6] have completed sentences, and except for provisions of probation or court supervision are not presently subject to penalty or incarceration.

Consolidated appeals were then taken to the Supreme Court of the State of New York, Appellate Division, Second Department. (Appendix at 39). Following affirmance of the trial court's decision, leave to appeal was granted by the New York State Court of Appeals which, on February 15, 1990, upon a decision that wiretap applications by the Director of the New York State Organized Crime Task Force were valid, affirmed the convictions of all Defendants. (Appendix at 1).

On May 10, 1990, Petitioner Corrigan submitted an *Application* for a Stay of the Judgment below[7] to Mr. Justice Marshall. This Petition is, therefore, filed as to the Decision and Order of the New York State Court of Appeals.

A central issue on appeal to the New York State Court of Appeals was the interpretation of 18 U.S.C. section 2516(2), the federal statute which limits State legislatures as to which officials can be authorized to apply for wiretap warrants. Information derived from wiretaps was used as the principal evidence against these defendants.

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[5] Petitioner Peter Finnerty proceeded to trial.

[6] Petitioners Corrigan, Biondo and Romersa.

[7] On September 1, 1987, Petitioner Corrigan was convicted of one count of Coercion in the First Degree (N.Y. Penal Law Section 135.65), and two counts of Conspiracy in the fifth degree (N.Y. Penal Law Section 105.05). He is currently subject to incarceration for a period not to exceed six (6) months. Petitioners Biondo and Romersa have not sought Stays.

The wiretap authorizations which led to the convictions were obtained on application by a special prosecutor – the head of the New York State Organized Crime Task Force ("OCTF") – who Petitioners contend is patently not "the principal prosecuting attorney" of the State. Petitioners argue that the New York State Attorney General is *the* principal prosecuting attorney.

Although this special prosecutor is designated by statute as a deputy attorney general, this is in name only. The Director of the OCTF is not an actual subordinate of the Attorney General, but rather, is appointed by the Governor and the State Attorney General jointly[8], and is immune from discipline, termination or other control by any single official – he is an autonomous, unelected, non-accountable second "principal prosecuting attorney".

The New York State Court of Appeals specifically found that two "principal prosecuting attorneys" could be created by the New York State legislature. Thus, the propriety of said applications for the wiretap warrants by this second designated official forms the basis of the instant Petition. If, as Petitioners contend, designation of such a second applicant was improper, the wiretap evidence should have been suppressed at trial.

ii. Stage in Proceedings Where the Issue was Raised

The issue presented herein was presented in substantially the same form in a motion to suppress the wiretap evidence in the trial court below. This issue was also raised on intermediate appeal and before the New York State Court of Appeals.

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[8] That statute provides, in relevant part,

> 2. Notwithstanding any other provision of law, the governor and the attorney general may, and without civil service examination, *jointly appoint and employ, fix his compensation, and at pleasure remove,* a deputy attorney general in charge of the organized crime task force.

N.Y. Exec. Law (McKinney), Section 70-a.

IX. BASIS FOR PETITION

Petitioners argue that it is appropriate for this Court to grant a Writ of Certiorari to resolve conflicting opinions among the U.S. Courts of Appeals and the state courts of last resort which have considered 18 U.S.C. section 2516(2)[9], with regard to the question of how many and which persons can properly be designated by a State statute as "the principal prosecuting attorney" for the purpose of obtaining wiretap authorizations. Petitioners assert that there are presently many disparate and conflicting judicial decisions as to this issue. If the Court declines to resolve this question, it is argued that the effect of the decision of the New York State Court of Appeals will be to foster a further proliferation of conflicting interpretations of this important federal statute.

Although this split in judicial decisions includes two U.S. Courts of Appeals, it should be noted that a divergence in state court opinions interpreting this statute is tantamount to what would normally be a further division between the Circuits – as this matter concerns a federal statute which preempts and limits state activities.

Wiretap applications by federal agencies and officers are made pursuant to 18 U.S.C. section 2516(1), while applications by state law enforcement officials are regulated by state statutes which must conform to the requirements of 18 U.S.C. 2516(2). Except in those relatively rare cases in which challenged information has been given to federal authorities by state law enforcement personnel, or where such evidence has been reviewed by a federal court pursuant to a writ of Habeas Corpus, cases involving the proper interpretation of subsection 2516(2) are before state courts and thus not

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[9] Rule 10.1.(b), Rules of the United States Supreme Court, states,

> [One of the instances in which the Court will consider a Writ of Certiorari is] when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a United States court of appeals.

subject to review by the U.S. Courts of Appeals. It is compelling, therefore, that a split has developed among the state courts *and* the U.S. Courts of Appeals which have interpreted sub-section 2516(2).

Petitioners further argue that permitting the courts to distort the strict language of this statute will also lead to additional unintended expansion of this act to suit purposes other than those enunciated by Congress. Such judicial expansion has also resulted in legislative incertitude surrounding the boundaries of 18 U.S.C. section 2516(2), which in turn has resulted in State legislative activity further exacerbating fragmentation.

This Court's review is, therefore, critical to the avoidance of a massive, uncontrolled divergence of judicial and legislative activities which, if not corrected by an unambiguous ruling from this Court, will soon require significant and even more extensive intervention. The entire congressional scheme is in immediate danger of unraveling. As the final arbiter of congressional intent, the U.S. Supreme Court must delineate the clear limits of 18 U.S.C. section 2516(2).

X. CONTENTIONS IN SUPPORT OF THE PETITION

i. Introduction

Petitioners rely on three arguments herein: (1) The language of the statute is clear and unambiguous – it allows only one "principal prosecuting attorney"; (2) the legislative intent of Congress is clear regarding this statute, as committee notes were specifically included to insure such clarity. Those notes evidenced Congress' intent to centralize wiretap authority in one official per political sub-division[10]; and (3) a

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[10] *See generally State v. Marine*, 464 A.2d 872 (Del.Supr. 1983),

> [t]he authorities indicate and the parties agree, that the function of 18 U.S.C. 2516(1) and (2) . . . is to *centralize policy making responsibility* for the use of electronic surveillance in the chief prosecuting

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comparison of 18 U.S.C. section 2516(2), with regard to the officials authorized to apply for state wiretaps, and 18 U.S.C. section 2516(1), which controls the same authorization as to federal wiretaps, demonstrates a specific intent on the part of Congress, endorsing and retaining the strict limitation to only one applicant for wiretap authority per political sub-division – only one "principal prosecuting attorney".

Finally, an issue also exists as to why this Court must review the instant case. Although a Writ of Certiorari has not issued previously as to less extreme formulations of this issue, the instant matter raises significant issues of fact and law not previously before the Court. First, this is the most extreme manifestation of the problem to date as the court below specifically determined that there could be a second principal prosecuting attorney – without requiring any real supervision, electoral accountability or centralization. Second, lack of prior review of the statute has allowed a chaotic situation to develop. Third, the confusion and chaotic activity at the judicial level concerning the interpretation of 18 U.S.C. section 2516(2) has now spilled over to the state legislatures.

ii. Clear and Unequivocal Language of the Statute

The most obvious argument in support of Petitioners' position is that Congress specifically choose the wording of the statute[11].

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officer of the state or county, *a person responsive to the political process.* See United States v. Giordano [416 U.S. 505 (1974)]. *Centralization of authority is deemed to prevent abuse of surveillance by focusing decision making responsibility.* (*Emphasis added.*)

[11] *See, e.g., Mallard v. U.S. Dist. Court for Southern Dist. of Iowa,* ___ U.S. ___, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989) (In

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> (2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications,

18 U.S.C. Section 2516(2). In choosing the word "the", and not "a", "any" or "one of the" in its drafting of sub-paragraph (2), Congress intentionally sought to bar any broader delegation of wiretap authority by the state legislatures. The plain intent was that there should be only one principal prosecuting attorney in each political sub-division. Any other interpretation makes the congressional choice of the word "the" (and the use of the singular tense of the word "officer" in the official committee comments[12]) meaningless. It is well recognized, however, that each word of the enactment must be interpreted by its plain, ordinary meaning[13], and given full force and effect[14].

The New York State Court of Appeals largely avoided this single and most compelling argument, dismissing it in a superficial, cursory aside[15] – apparently

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interpreting a statutory provision, the Court must first look to the plain language of that statute).

[12] S.Rep. No. 1079, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code, Cong. & Admin. News 2112, 2187 ("Committee Report").

[13] *See Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989); *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520 (11th Cir. 1987); *U.S. Dept. of Health and Human Services v. Smith*, 807 F.2d 122 (8th Cir. 1986).

[14] *See generally Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520 (11th Cir. 1987); *U.S. Dept. of Health and Human Services v. Smith*, 807 F.2d 122 (8th Cir. 1986).

[15] To be fair, the Court of Appeals did offer three half-hearted tokens of analysis as to statutory construction. First, at

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deciding instead to amend the statute based on its own perceptions of public policy considerations. That Court

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page 4 of its Opinion, the court states "legislative history support[s] our rejection of this cramped construction [of the word "the"]". The court then quotes the committee statement that,

> [s]tate legislation enacted in conformity with this chapter should specifically designate the principal prosecuting attorneys empowered to authorize interceptions.

for the proposition that the use of the plural – "attorneys" – suggests an intent to allow more than one principal prosecuting attorney per political sub-division. The court seems to have forgotten, however, that the statute authorizes the designation of many principal prosecuting attorneys – one for each political sub-division, and thus the comments would naturally discuss "attorneys". To somehow draw a conclusion that the use of the plural, "attorneys", in this context allows multiple designations per political sub-division approaches the absurd.

Second, the court notes that six federal officials are authorized to make wiretap application by sub-section (1), as support for the contention that Congress intended authorization of multiple "principal prosecuting attorneys", but simply did not know what they would be called. The New York Court of Appeals suggests that Congress, therefore, solved this dilemma by not trying to delineate the authorized officials. This is exactly the point – Congress knew how to use other limiting language, and did so in sub-section (1). In addition to which, as will be shown below, Congress did not originally designate the six federal officials discussed. The statute was amended as to this exact issue three times to add additional federal officials – when the plain language originally limited such authorizations.

Third, and finally, the court wandered furthest afield when it suggested that the committee statement that [the important issue was] "not name but function" means that more than one person can be designated as the principal prosecuting attorney in a given political sub-division.

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cannot, however, amend the English language. The word "the" has a clear meaning[16],

> **the** <*definite article*> 1: that *in particular* (*Emphasis added.*)

If this simple formulation lacks sophistication, another source can be consulted[17].

> **the** . . . 1. that (one) being spoken of or already mentioned: as *the* story ended.

Thus, to sustain the New York State Court of Appeals' interpretation of the statute would be to delete Congress' wording, and to substitute phraseology the New York State Legislature decided was more appropriate. This Court must either decide that "the" means "the" – the principal prosecuting attorney *"in particular"*, or it must now rule that Congress' wording and clear intent may be disregarded by the States. There can be no doubt, but that this is **the** most important issue in this cause[18].

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How can this comment mean anything other than what is written? One can refer to that principal prosecuting attorney as the "attorney general", the "state proescutor", the "district attorney" or one can call him (or her) "Fred" – as long as s/he is **THE** single, sole, and only principal prosecuting attorney of that political sub-division, s/he can be authorized by State statute to apply for wiretaps. *See generally United States v. Pellicci*, 504 F.2d 1106 (1st Cir. 1974), *cert. den.* 419 U.S. 1122 (1974) (By analogy to this issue, use of a job title instead of a name is irrelevant, so long as result does not run afoul of intent that designation is singular, and confined to someone responsive to the political process); *United States v. Camp*, 723 F.2d 741 (9th Cir. 1984).

[16] *The Merriam-Webster Dictionary*, Pocket Books, 1974.

[17] *Webster's Unabridged Dictionary*, World Publishing Co., 2nd Ed., 1964 *at* 1860.

[18] *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454 (1987) (Except in highly exceptional circumstances, if this Court finds that language of the statute will allow unambiguous interpretation, analysis is complete, and nothing further is considered).

This Petition presents an issue with critical national impact which should not be ignored. Only the U.S. Supreme Court is **the** Court which can correct the decision below, singular in its capacity as the final arbiter of congressional intent.

iii. Legislative Intent in the Statutory Language

The intent of Congress can be readily determined by reference to the specific interpretation of 18 U.S.C. section 2516(2) by the committee which drafted it. As will be demonstrated below, that committee made it plain that the completely unambiguous legislative intent was to make the word "the" exclusive, rather than inclusive. Congress sought a single, centralized, accountable state official to be responsible for, and aware of all such intercept activity.

Indeed, at the time this law was enacted, Congress wished to be very clear about its desire to keep the power to apply for wiretap authorizations, the coordinating ability, and the accountability in one central individual's hands for any given political subdivision. *The drafters specifically stated this to be their intent.* They first noted that

> because of the complexity in the area of wiretapping and electronic surveillance, the committee believe[d] that a comprehensive and in-depth analysis of Title III would be appropriate *in order to make explicit congressional intent in this area. (Emphasis added.)*

Committee Report at 2177. The report continues to "make explicit congressional intent" as to this issue, stating:

> [i]n most states, **the** principal prosecuting attorney of the state *would be the attorney general.* The important question, however, is not name but function. The intent of the proposed provision is to provide for the *centralization of policy* relating to state-wide law enforcement in the area of the use of electronic surveillance in **the** *chief* prosecuting *officer* of the State. (*Emphasis added.*)

Committee Report at 2187.

The wording is "officer" not "officers" – is a second interpretation possible? If at the time the statute was enacted, Congress stated that it sought to empower

the

chief

prosecuting

officer

the attorney general

It would seem that Congress adequately covered the question of "how many" officials could be designated in three separate ways: (i) "*The*" was again used instead of "several", "any" or similar language; (ii) "chief" is equally singular, there cannot be two chiefs; finally, (iii) "officer" was not written as "officers", or "officer or his designee" or "the head of some other agency over which that officer has joint control", or "officer or other officials who have jobs similar to his" – Congress simply did not choose to use these words.

This is from the section commentary by the very committee which drafted this law after much discussion, and is specifically identified by the committee as being provided to explain the intent of the statute and to make interpretation less confusing.

Although Petitioners do not wish to belabor the point, still further evidence of clear linguistic direction by Congress to "centralize" the wiretap function in one individual is available. First, the comments state that they exist to "make **explicit** congressional intent in this area". Second, we are told that the law anticipates granting of authority to the state attorney general, whatever his specific state title may be; not his assistant, and not anyone else. Finally, the committee makes it clear that the reason for the specific and singular delegation is to "centralize" the functions and policy relating to electronic surveillance. The intent, as stated, is that one and only one person can be ***the*** principal prosecuting attorney. To allow otherwise is to totally ignore not only the plain language of the statute, but also the primary congressional goal of centralization.

iv. Congressional Acceptance of Original Intent and Indication of Desire to Retain Original Meaning

The clear and unambiguous choice of wording by Congress notwithstanding, there is other, equally compelling evidence of continuing congressional recognition of its intent to limit and centralize this authority.

The parallel statute, 18 U.S.C. section 2516(1)[19] delineates the proper federal official as to intercept applications, and specifically provides for and limits the delegation of this authority to certain specific persons. Indeed, pursuant to the doctrine of *noscitur a sociis*[20] much can be gleaned from a side-by-side examination of the history of these two sub-sections.

After the original enactment of sub-sections 2516(1) and 2516(2) in 1968[21], these provisions have been closely scrutinized, as is demonstrated by the statute's having been amended several times: in 1970, Par. 1(c), Pub.L.

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[19] **Section 2516. Authorization for interception of wire, oral, or electronic communications**

> (1) The *Attorney General, Deputy Attorney General, Associate Attorney General,* or **any** *Assistant Attorney General,* **any** *acting Assistant Attorney General,* or **any** *Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General,* may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of . . . (*Emphasis added.*)

[20] *See generally Auto-Ordnance Corp. v. U.S.*, 822 F.2d 1566, *on remand* 14 Cl.Ct. 295 (Fed. Cir. 1987); *DeSisto College, Inc. v. Town of Howey-in-the-Hills*, 706 F.Supp. 1479 (M.D. Fla. 1989).

[21] Pub.L. 90-351, Title III section 802, 82 Stat. 216 (1968).

91-452; in 1971, Par. 1(c), Pub.L. 91-644; in 1978, Par. 1(e) Pub.L. 95-598; in 1982, Pub.L. 97-285; in 1984, P.L. 98-473 1203(c)(4); in 1986 P.L. 99-508, and in 1988, Pub.L. 100-690. In 1984, 1986 and 1988, Congress acted to change the specific designation of *who* could exercise the application authority for federal wiretaps[22]. Twice, in 1984 and 1986, this meant altering *how many* persons had such authority. The amendments acted only to modify and expand the *definitions of which and how many federal officials may act with regard to intercepts*. It must be presumed that Congress knew and approved[23] of the existence of the limiting wording in sub-section (2), and that it would have amended the provisions applicable to the States had it so intended[24].

Throughout the extensive scrutiny and amendment of 18 U.S.C. Section 2516, the majority of judicial decisions interpreting who could be the proper State official took the position Petitioners assert herein; that there could be only one person ultimately accountable. These decisions supported the centralization scheme envisioned by Congress and are squarely in line with the wording and original, stated congressional intent. Congress was aware of these cases, knew the language of section

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[22] The 1984 Amendment added "Deputy Attorney General, Associate Attorney General" after the phrase "Attorney General" Pub.L.98-473, section 1203(c)(4). And when, in 1986, Congress decided to further expand the list to include their subordinates, it added "any Assistant Attorney General, any Acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated" or "any Assistant Attorney General specially designated." Pub.L. 99-508, section 104.

[23] *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

[24] *See generally U.S. v. Espinoza-Leon*, 873 F.2d 743 (4th Cir. 1989) *cert. denied* 109 S.Ct. 3257 (1989).

2516(2)[25], and knew that the original committee declared centralization to be at the foundation of this sub-section. In three actions over twenty years, when these very concepts have been repeatedly amended in sub-paragraph (1), it did not once act to broaden the list of state officials who could be authorized to apply for wiretaps. It did not once move to decentralize the functions of the single, specifically designated prosecuting attorney at either the state or county levels.

> The Congress would not have so carefully limited the power of the Attorney General of the United States to delegate to a specifically designated assistant [the authority to obtain wiretap orders] and at the same time bestowed upon the principal prosecutor of any State, city or county in the nation an unbridled license to clothe any or all of his or her assistants with permission to seek such orders. It is inconceivable that the country's highest legal officer would be so shackled while the principal prosecutor of the least populated county in the United States was free to permit any designee to apply for an interception order.

Poore v. Maryland, 39 Md.App. 44, 384 A.2d 103 (Md.Ct.Special Appeals 1978), *cert. denied* 282 Md. 737 (1978), *referring to United States v. Giordano*, 416 U.S. 505 (1974). Nor did Congress attempt to remove the limiting language authorizing only one official per political subdivision. The New York Court of Appeals has also disregarded this compelling argument and, in effect, sanctioned the legislature's override of specific congressional intent.

All except one of the state court decisions[26] limiting this authorization to *the* principal prosecuting attorney were of record before Congress addressed the "who"

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[25] *Cannon v. University of Chicago*, 441 U.S. 677 (1979), *on remand* 605 F.2d 560, *cert. den.* 454 U.S. 1128.

[26] *See Infra.*

and "how many" issues in sub-paragraph (1). Clearly, Congress chose not to make a similar change in the provisions applicable to the states. Had Congress felt these court decisions were in error, or failed to properly delineate the limitations it intended to impose on the states, it could have simultaneously amended sub-section 2516(2) in the same manner as it amended sub-section 2516(1) – to clarify its new desire to modify the original drafters' explicit concerns[27].

Congress might have stated, as it did with regard to the federal government, that several "equivalent" officials had this authority. Congress could also have amended the statute to declare that the states were free to enact legislation as they might see fit to create more than one "principal prosecuting attorney", but it did not. Only the New York State Court of Appeals, without any clear explanation, has attempted to contradict the original intent of Congress, and to "amend" the statute to remove specific congressional limitations.

When Congress chose to broaden sub-section 2516(1) and not sub-section 2516(2) despite the decisions narrowly interpreting both sub-sections it, by necessary implication, approved of those decisions narrowly interpreting sub-section 2516(2). Logic and common sense allow no other conclusion.

Thus, the specific amendments to broaden the list of authorized federal officials in the parallel sub-section of this statute further demonstrate that the strict interpretations of sub-section 2516(2) were acknowledged by Congress as being a correct reflection of the statute.

V. Present Split, Fragmentation and Chaos – Judicial

It may be argued that in the instant cause, the opinion of the New York State Court of Appeals has merely

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[27] *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988).

determined that, as a matter of state law, the Director of the Organized Crime Task Force (OCTF) is *a* "principal prosecuting attorney" of the State of New York, and as such, his designation is an issue of state rather than federal law. Petitioners contend that it is sub-section 2516(2), however, which preempts this area and establishes the limitations as to which, and how many, officials a state statute can properly designate to apply for authorization to conduct wiretaps. The limiting language of sub-section 2516(2) simply prohibits making a second designation[28]. By suddenly allowing a second (or third), *independent* and on-going source for state wiretap applications, the unique centralization scheme envisioned by Congress is destroyed.

The critical importance of centralization of this function can only be measured in light of the intent of Congress as it drafted this provision – an intent which has consistently resulted in its decision not to alter this statute on no less than three recent opportunities.

Congressional intent and the public policy considerations are clear, and have been reflected in both the congressional committee's statements and the majority of court decisions to date. Thus, Petitioners submit that their Petition must be heard by this Court, to correct a dangerously divergent, poorly reasoned opinion.

Petitioners submit that the New York State Court of Appeals' interpretation of 18 U.S.C. Section 2516(2) is so divergent from the majority view of this statute that the split of interpretations meets the criteria for issuance of a Writ of Certiorari. As was shown above, the relevant statute, 18 U.S.C. Section 2516(2), is unambiguous on its face. In discussing "which", and more importantly, *"how many"* State officials can be proper eavesdropping

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[28] As noted above, Petitioners recognize that the statute has been interpreted to allow *delegation* to an immediate subordinate under well delineated and extremely controlled circumstances.

applicants, this sub-section provides that only "***the*** principal prosecuting attorney" of the State or political subdivision may apply for an intercept, and gives certain powers only to "***such*** attorney".

A review of other decisions which interpret this statute demonstrates that although there exists a "majority" view, a significant split exists among the Circuits and the various state courts which have interpreted this provision. A simple analysis reveals that this considerable divergence has resulted in what can be characterized as four major "schools" of thought on this matter:

Strict Construction – Majority view

1. Only one "Principal Prosecuting Attorney"

Non-Strict Construction – Minority View

2. Limited Designation of Higher Level – Superior, Elected Officials

3. Limited Designation of Lower Level Subordinates under Specific, Controlled Circumstances

4. Major Designation of Completely Independent Persons Who are Neither Direct Subordinates or Direct Superiors (the instant cause)

Petitioners submit the following summary analysis of each of these views.

Strict Construction (Majority)

1. In *Strict Construction* decisions, courts have interpreted the statute as allowing only one person, specifically designated by state statute as "the principal prosecuting attorney". Only this person may apply for such wiretap authority.[29] (Others might be able to apply

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[29] *See, e.g., State v. Frink*, 296 Minn. 57, 206 N.W.2d 664 (1973); *State v. Farha*, 218 Kan. 394, 544 P.2d 341 (1975), *cert.*

(Continued on following page)

where the function is solely ministerial[30], having been given authority by the designated person or where there is another "acting" official while the designated individual is away on business[31], or is ill and unable to perform his function[32].)

The majority of states which have ruled on this point have strictly interpreted the language of 18 U.S.C. section 2516(2) – an interpretation to which Petitioners subscribe.

Non-Strict Construction

2. *Limited Expansion "Upward"*. At least one Court has expressed the view that direct superiors of the "principal prosecuting attorney", in terms of authority and responsibility, may apply for wiretaps under the Act[33].

(Continued from previous page)

denied 426 U.S. 949 (1976); *State v. Daniels*, 381 So.2d 707 (Fla.App. 1979), *affirmed* 389 So.2d 631 (Fla. 1980); *State v. Cocuzza*, 123 N.J.Super. 14, 301 A.2d 204 (1973); *Poore v. State*, 39 Md.App. 44, 384 A.2d 103 (1968 Md.Ct.Special Appeals), *cert. denied* 282 Md. 737 (1978); *see also Application of Olander*, 213 Kan. 282, 515 P.2d 1211 (1973).

[30] *United States v. Fury*, 554 F.2d 522 (2nd Cir. 1977) *cert. denied sub nom Quinn v. U.S.*, 433 U.S. 910, *cert. further denied sub nom Fury v. U.S.*, 436 U.S. 931 (1978); *State v. Travis*, 308 A.2d 78 (N.J.Co. 1973); *affirmed* 336 A.2d 489 (N.J.Sup.Ct.App.Div. 1975).

[31] As an example, *see People v. Fusco*, 75 Misc.2d 981, 348 NYS2d 858 (1973).

[32] *People v. Silver*, 104 Ill.Dec. 481, 151 Ill.App.3d 156, 502 N.E.2d 1141 (1st Dist. 1986)(Even where downward designation was allowed for unavailable (illness) principal designated attorney, Court cautioned that holding was "strictly limited" to situations where good faith attempt at contact had first been made.

[33] *United States v. Pacheco*, 489 F.2d 554 (5th Cir. 1974), *rehearing denied* 491 F.2d 1272, *cert. denied* 421 U.S. 909.

Thus, a state statute was upheld where the Governor was designated as an applicant along with the State Attorney General. Even in this slightly broader case, the court stressed three critically limiting factors: (1) the Governor was the Attorney General's superior, (2) he was directly responsible for the Attorney General – having the power to discipline and control, and (3) like the Attorney General, the Governor was an elected official – also directly responsible to the electorate.

3. *Limited Designation "Downward"*. At least two jurisdictions presently allow, pursuant to court interpretations[34], direct subordinates of the "principal prosecuting attorney" to make wiretap applications under certain *highly controlled circumstances, on a specific, ad hoc basis.* In *Vitello,* the court stated:

> We attach much weight to the fact that the assistant district attorney must be specifically designated by the district attorney. We interpret this to mean that an assistant district attorney may not apply at will for wiretap orders but must bring the matter before his senior officer the district attorney.
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> * * *
>
> Through this process the necessary *centralization* is provided for as is the concomitant protection that *the individual with final authority* to regulate electronic surveillance be *subject to public accountability.* (*Emphasis added*).

Id. at 838.

In upholding a State statute which appeared to allow a very controlled designation of this authority, the First Circuit, in *United States v. Smith,* 726 F.2d 852 (1st Cir. 1984), pointed out a critical "saving element" – delegation would have been impermissible were it not for the absolute requirement that each application, individually, had to be upon assignment from, and be signed by, *the*

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[34] *Commonwealth v. Vitello,* 367 Mass. 224, 327 N.E.2d 819 (1975); *State v. Marine,* 464 A.2d 872 (Del. 1983).

"chief prosecuting attorney". There was, however, no question as to the need to have only one, centralized official make specific, ad hoc delegation – as intended by the statute.

4. *Major Designation of Completely Independent Persons Who are Neither Direct Subordinates or Direct Superiors* (the instant cause). To date, the New York State Court of Appeals is the only court that has gone so far beyond both the **majority** "strict construction" view, and beyond even the limited delegation seen in *Vitello*. By upholding a state statute which, *ipso facto*, interprets the federal act expansively, the New York State Court of Appeals has torn an already frayed cloth asunder.

In the instant action, the only decision of its kind in the entire country even remotely this broad, the New York State Court of Appeals has done more than expand the prior borders of this statute. The court has tortured the clear meaning of the federal statutory language to encompass the head of the O.C.T.F., an unchecked, non-subordinate of the principal prosecuting attorney. This newly expanded interpretation of sub-paragraph (2) where the word "the" does not mean "the", but rather "any", exposes the danger which is inherent when such a divergence exists in interpretations between the various jurisdictions. If allowed to stand, such a decision from an influential jurisdiction will result in even more rapid fragmentation among other courts, which will, in turn, cause degeneration of the congressional plan for the centralization of state wiretap functions, which is the very heart of this legislation[35].

The New York State Court of Appeals, however, by its opinion in the instant matter, not only puts

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[35] *See United States v. Martinez*, 588 F.2d 1227 (9th Cir. 1978) (Intent to place responsibility in centralized official, subject to political pressures, responds to concerns as to uniform standards, affixing blame and guaranteeing a single accountable individual).

itself completely at odds with at least seven other States and one of the two circuits which have addressed this issue, but also removes itself from the clear intent of the law. Quite simply, this opinion results in the abrogation of the congressional scheme. The only real issue in this Petition, as stated above, is the intent of the original drafters, and of the legislators and congressional committees who followed them. This intent cannot be so conveniently ignored to suit the concerns of any one State.

Under the New York statute as upheld by the New York State Court of Appeals, blanket authority from the Attorney General was clearly allowed as to a *second completely separate and independent official*, the Director of the New York State Organized Crime Task Force. The record reflects that this additional designee is not the elected[36] superior of the central, designated official, the State Attorney General. He is not the alter ego of that official, acting in his stead[37], or in a ministerial capacity, and he is not the subordinate of the Attorney General in the strict sense, as he is appointed and controlled jointly by the Governor[38]. Thus, the New York State Court of Appeals has upheld the broadest expansion of the statutory term "**the**" to date.

This decision permits a jointly ***appointed*** official, not under the sole control of any one elected official, to

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[36] "The purpose of the procedure set forth in 18 U.S.C. section 2516(2) is to place the responsibility for authorization in a specific and identifiable person who is answerable to the people." *State v. McGillicuddy*, 342 So.2d 567 (Fla.App. 1977); *see also United States v. Martinez*, 588 F.2d 1277 (9th Cir. 1978).

[37] As an analogy, see a similar delegation between the Attorney General and an Assistant Attorney General, before sub-section (1) was amended. *United States v. Kilgore*, 518 F.2d 496 (5th Cir. 1975); *rehearing denied* 524 F.2d 957 (5th Cir.), *cert. denied* 425 U.S. 905, *rehearing denied* 430 U.S. 976 (1977).

[38] *See N.Y. Exec. Law (McKinney)*, Section 70-a, above.

receive virtually plenary intercept authority in contravention of the unambiguous congressional intent. This wiretap authority, in the hands of a non-elected, second, and for the most part, "legally anonymous", autonomous civil servant is exactly what Congress sought to avoid in drafting sub-section 2516(2) and preempting the States' power to decentralize this authority.

Under the New York "alternative", intercepts and applications for those intercepts are not subject to being reviewed through a single, accountable, accurate source, and thus wiretapping is not subject to effective oversight.

New York State's delegation of this authority goes well beyond concerns of accountability and identification of the "actor". It shatters the *specific intent of the drafters* that the power to initiate intercepts and to intrude on individual citizens remain centralized. This theme is repeated over and over in committee commentary both during the enactment and in its interpretation of this legislation. The decision of the New York State Court of Appeals does not even attempt to address how the statute could possibly be tortured to reach such a result, one so contrary to the ***express*** intent of Congress. To the concern of the dissent, the decision below focuses instead on the "policy" reasons for allowing this non-elected deputy to exercise the ***de facto*** authority to operate under the federal act despite the clear limitations of 18 U.S.C. section 2615(2).

It is also important to note that although the state courts are necessarily the primary forum for the interpretation of sub-section 2516(2), even the limited federal appellate experience which exists with regard to subsection (2) has seen conflict between the Circuits. The First Circuit Court of Appeals, in *United States v. Smith*, 726 F.2d 852 (1st Cir. 1984), adopted an interpretation which is virtually identical to the Petitioners' position herein. In doing so, that court specifically rejected the view which has been advanced by the New York State Court of Appeals in the instant matter.

The Fifth Circuit also refused to effect such a broad interpretation. That court did, however, adopt a somewhat broader reading of the statute in an early decision. *United States v. Pacheco,* 489 F.2d 554 (5th Cir. 1974), *rehearing denied* 491 F.2d 1272, *certiorari denied* 421 US 909 (1975) (Upholding the authority of the Governor of the State of Florida to authorize wiretaps, in addition to the state attorney general's authority.) It is important to note, however, that the reasoning in *Pacheco* stressed the fact that the governor was an elected, politically accountable official. This reasoning does not completely oppose the view which Petitioners urge, and yet, the holding is nevertheless at odds with *Smith,* and with many of the State decisions noted by Petitioners herein.

The *Pacheco* decision highlights the dilemma: Courts are not simply generating a split with regard to this issue – at least not a simple two-way split – what is being created is a fragmentation where each of the resulting pieces is again split – ultimately resulting in so many rules of law that the Congressional scheme becomes meaningless.

The majority of state courts which have considered the issue have interpreted sub-section (2) in a manner consistent with the position asserted by the Petitioners, but Petitioners submit that in no way can one suggest that a uniform interpretation of this critical federal statute exists. The Court cannot turn its back to the legal theories and holdings that veer wildly away from the language of the statute. Nor can the Court ignore the express intent of Congress as set forth in the section-by-section analysis provided by the drafters at the time the law was enacted.

In *Commonwealth v. Vitello,* 327 N.E. 319 (Mass. 1975), for example, following a detailed analysis, the Supreme Judicial Court of Massachusetts upheld the wiretap applications in question. Those intercepts had been authorized by assistant district attorneys. While this might, at first blush, seem to support the People's position in the instant case, the Massachusetts statute and that court's analysis, in fact, support Petitioners' position – holding that the

statute, although permitting delegation to a direct, controllable subordinate, nonetheless required a *specific delegation for each particular case* with the inherent safeguards an individual case by case delegation of authority would entail. Even with such protections in place, the court was clear in stating that *a generic, or blanket authorization* (such as was present in the instant matter) *would be improper.* That court then went on to suggest that the acceptable practice would be to require the Attorney General, or District Attorney, to co-sign the application for the authorization to conduct an intercept. This is critical because such a requirement would maintain the centralized awareness and accountability of all such applications.

Even in Florida, the jurisdiction from whence comes *Pacheco,* the next broadest interpretation after the instant case, the State Court of Appeals, in a later decision ruled that ***only*** the State Attorney General, or the State's Attorney for a particular district, had authority to apply for an intercept under 2516(2). *State v. Daniels,* 381 So.2d 707 (Fla.App. 1979), *affirmed* 389 So.2d 631 (Fla. 1980) (blanket authorizations *were not* in conformity with the Federal Law.)

vi. Present Split, Fragmentation and Chaos – Statutory

Petitioners assert that there was simply an inappropriate delegation of authority in the New York State Statute (section 700.05) which flew directly in the face of 18 U.S.C. section 2516(2), and which is now at the forefront of several conflicting decisions which are fragmenting the clear Congressional scheme.

If there is any question as to the effect of this confusion on the States, it is only necessary to briefly review their individual wiretap statutes. While some States continue to abide by the language of 18 U.S.C. section 2516(2)[39], others have recently begun to step, ever so

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[39] See Title 38 Ill. Code Crim. Proc., Section 108A-1; providing for exercise of the wiretap function by the "State Attorney" only.

gently, over the "single authorized official" line[40]. Still other States, now aware of the latitude which seems to have developed are using their statutes to leap well beyond any restraining boundaries[41].

An example of this phenomena can be seen in recent efforts of the Florida legislature. In 1988, Florida rewrote what is now *Florida Criminal Procedure and Corrections*, Section 934.07, clarifying the list of individuals authorized to seek wiretaps: The Governor, the Attorney General, and any state attorney. In 1989, this statute was amended, and the "State Wide Prosecutor" was added to the roster. Thus, Florida appears to have carefully aggregated "little" exceptions (upward to the governor, and strongly downward to create authorization for a semi-autonomous special prosecutor) to arrive at a far broader list of authorized officials than was intended by Congress. They have constructed a broad exception to 18 U.S.C. section 2516(2) by a patchwork of judicially created anomalies. Absent any coherent interpretation of the Congressional intent as to the statutory language, jurisdictions will continue to improvise and the already fragmented meaning of sub-section 2516(2) will degenerate into random confusion.

XI. CONCLUSION

There is a major divergence in authority which exists between jurisdictions interpreting 18 U.S.C. section

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[40] In 1988, California enacted the Presley-Felando-Eaves Wiretap Act, Calif. Penal Code, Section 629, which states, in relevant part, that either the Attorney General or the chief Assistant Attorney General (Criminal Law Division) can apply for wiretap authority. See also Hawaii Rev. Stat. § 803-44; Mass. Gen. L. ch. 272 § 99; Minn. Stat. Ann. § 626A.05; N.H. Rev. Stat. Ann. § 570-A:7; N.D. Cent. Code § 29-29.2-02; R.I. Gen. Laws 12-5.1-2; S.C. Code Ann. § 17-29-30; Utah Code Ann. § 77-23a-8; Va. Code Ann. § 19.2-66.

[41] A review of the designation language in the statutes of all States which have enacted wiretap provisions further

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2516(2). The split not only exists with regard to a strict versus expansive construction as to whom the appropriate official authorized to seek intercepts may be, but is further fragmented by those judicial decisions allowing other degrees of latitude, *such* as who should be the appropriate secondary officials(s).

This divergence of authority involves both the state courts, which are necessarily the primary forums for review of this important federal statute, and the federal courts (including Circuit Courts) which have spoken to the issue. This is a matter of great impact, and a matter of urgency.

Petitioners concede that the issue of which official is "*the* principal prosecuting authority" in a given State is solely a question governed by State law. If, in the instant cause, there were a statute clearly delineating that the Director of the OCTF were *the* principal prosecuting attorney, or had the New York State Court of Appeals ruled that the Director was indeed *the* sole, authorized official pursuant to State law, with such functions centralized in him, there could be no dispute. The only obstacle to such a hypothetical proposition is that it simply is not the law as it exists in New York State, nor is it the reality.[42] The

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demonstrates this risk. *Appendix at 56* is a chart of all applicable statutes with reference to the official(s) who are authorized to exercise wiretap application authority. Note the "broadness" of the evolving definition of *who* is empowered to act. Note also, Md. Cts. & Jud. Proc. Code Ann. § 10-406; W.V. Code § 62-1D-8; Wyo. Stat. § 7-3-605.

[42] *See e.g.*, Appendix at 66, Report on Applications for Order Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications (Wiretap Report) for the Period January 1, 1988 to December 31, 1988, Administrative Office of the U.S. Courts, 1989 (N.Y. Attorney General applied for 28 intercept orders, Director, OCTF for none.)

New York State Court of Appeals did not, and could not, so rule. Rather, it tacitly found that while the State Attorney General as the chief prosecutor was the "principal official", somehow there could be *two* such officials under the Congressional scheme expressed by 18 U.S.C. section 2516(2) – although how it arrived at this conclusion is not clear. Such a finding, however, directly contradicts the stated congressional intent to centralize function, policy and accountability.

WHEREFORE, Petitioners urge that this Court issue forth a Writ of Certiorari requiring the New York State Court of Appeals to provide the record and all transcripts in this matter. Petitioners respectfully request that upon receipt of said record, and upon the briefs of the parties hereto, the Court review the issue described in this Petition.

Respectfully submitted,

A. J. Weiss & Associates

Carl J. Hartmann, III,
Counsel of Record

A. Jeffrey Weiss, Esq.
Judd S. Conway, Esq.
Paul J. Ruskin, Esq.
A. J. Weiss & Associates
425 Park Avenue
26th Floor
New York, New York 10023
Telephone: (212) 725-6327

Attorneys for the Petitioners

STATE OF NEW YORK
COURT OF APPEALS

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

2 No. 4
The People &c.,
Respondent,

v.

Anthony Vespucci, et al.,
Appellants.

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2 No. 5
The People &c.,
Respondent,

v.

Private Sanitation Industry Association of Nassau/Suffolk, Inc.,
Appellant.

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2 No. 6
The People &c.,
Respondent,

v.

Jamaica Ash and Rubbish Removal Co., Inc.,
Appellant.

Bernard S. Meyer, Andrew J. Turro, Mineola, for appellants Vespucci, et al. and Private Sanitation Industry Association of Nassau/Suffolk, Inc.

Stephen P. Scaring, Laurie S. Hershey, Mineola, for appellant Jamaica Ash and Rubbish Removal Co. Inc.

Steven Chananie, Ronald Goldstock, Martin Marcus, Organized Crime Task Force, for respondent.

BELLACOSA, J.:

Defendants challenge their convictions principally on the ground that the Director of the New York State Organized Crime Task Force (OCTF) lacks authority to be an applicant for eavesdropping warrants. They premise this argument on the assertion that the State statute (CPL 700.05[5]), which expressly includes the Director of OCTF as a law enforcement officer authorized to apply for warrants, is inconsistent with and violative of its Federal enabling antecedent (18 USC §2516[2]). We conclude that there is no infirmity in the New York State statute or in its utilization to secure the challenged warrants obtained by OCTF's Director in accordance with the valid State statute and procedures. We are also satisfied that the sealing requirements of CPL 700.50(2) have been met on this record, and we therefore affirm the orders of the Appellate Division which had affirmed defendants' convictions.

The most serious charges of which defendants were convicted were coercion and conspiracy. This culminated a lengthy and complex investigation by the OCTF into organized crime infiltration of the refuse-carting industry in Nassau and Suffolk counties. A targeted victim of the criminal enterprise – a legitimate businessman – gave information in 1982 to the OCTF which triggered the specific investigation. Over the course of thirteen months in 1982 and 1983, the OCTF uncovered the pervasive tentacles of organized crime in Long Island's carting industry, networked by a conspiracy of bribery and violent

activities. Indictments ensued and all but one of the defendants pled guilty to the charges against them. Defendant Finnerty went to trial and was also convicted.

The OCTF's primary investigatory and evidence-gathering weapon was eavesdropping. Seven warrants were issued over the course of the probe. The OCTF Director applied for these eavesdropping warrants pursuant to CPL 700.05(5), which provides: " 'Applicant' [for an eavesdropping warrant] means a district attorney or the attorney general *or if authorized by the attorney general, the deputy attorney general in charge of the organized crime task force*" [emphasis added]. Defendants contend CPL 700.05(5) is invalid because the Federal statute does not allow this State criminal law official to be included among the few authorized applicants. Therefore, they urge the evidence, otherwise legally obtained with the warrants, was illegally obtained and should have been suppressed.

Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968 "impose[s] upon the States the minimum constitutional criteria for electronic surveillance" (*People v. Shapiro*, 50 NY2d 747, 762-63 [citations omitted], 18 USC §2510 *et seq.*). While a State may enact legislation more restrictive than the baseline protections allowed by this Act, "any State law drawn more broadly * * * runs afoul of the supremacy clause (US Const, art VI, cl 2)" (*People v. Shapiro, supra*, at 763 [citation omitted]). The US Code, Title 3, limits those who may be applicants for court-authorized eavesdropping warrants to "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any subdivision thereof, if such attorney is authorized by a statute of that State" (18 USC

§2516[2]). Defendants contend that the CPL 700.05(5) authorization of "the deputy attorney general in charge of the organized crime task force" impermissibly broadens the literal letter and the overarching purpose of that threshold part of Title 3. We disagree.

Defendants argue that conferring applicant status for securing court-ordered eavesdropping warrants on this sole specialized statutory Deputy Attorney-General violates the Federal statute because it uses the definitive article "the" in qualifying a "principal prosecuting attorney". Yet Congress was writing a generic enabling statute to cover the fifty widely varying official titles and chains of command in all the State jurisdictions. Also, countervailing Congressional words and action elsewhere in the comprehensive Federal act and its legislative history support our rejection of this cramped construction: "State legislation enacted in conformity with this chapter should specifically designate the principal prosecuting *attorneys* empowered to authorize interceptions" (S Rep No. 1079, 90th Cong, 2d Sess, 1968, reprinted in 1968 US Code Cong & Admin News 2112, 2189 [hereinafter Senate Report] [emphasis added]). The multiplicity, albeit high-level, of permissible applicants intended by Congress is additionally manifested by 18 USC §2516(1), which lists six separate Federal prosecuting attorneys authorized to apply for eavesdropping warrants. Indeed, the statute enacted by Congress for the "State" (for Title 3 purposes) of the District of Columbia permits the United States Attorney to "authorize * * * any investigative or law enforcement officer" to be an applicant (D.C. Code Ann. §23-546[a] [1981], *see*, Note, Significant Developments – Electronic Surveillance – *State Authorization of Wiretaps*

Under Title III, 56 B U L Rev 600, 606). We are further aided in our inquiry by this Congressional admonition: "The important question [in determining valid applicants], however, is not name but function." (Senate Report, at 2187). Congress, we therefore conclude, did not intend the straitjacketed implementation of this important legislation urged upon us by defendants-appellants and the dissenting opinion. Congress instead reflected a more realistic and flexible, though limited, high-level roster of applicants (*see also, United States v. Smith*, 726 F2d 852, 857-858).

An overall goal of Title 3 is "delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized" (Senate Report, at 2153). To this end, the specific mandate of 18 USC §2516(2) "provide[s] for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State" (Senate Report, at 2187). The essential question is whether the OCTF Director is precluded from qualifying as the "principal prosecuting attorney" within the language and meaning of 18 USC §2516(2). An examination of the purpose and function of the New York State OCTF and its Director's responsibilities supports the view that this officer should not be written out of the New York State authorization statute, as that would ironically contradict the centralization objective of the Federal statue.

The proliferation-of-authorized-applicants hypothesis advanced by the dissent may be readily dispelled. In 1970, the New York State Legislature established a statewide organized crime task force (Exec. Law §70-a). The

stated reason for the creation of the OCTF is remarkably consonant with that underlying the enactment and the limitations of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USC §2516[2]): to insure centralization and consistency in law enforcement against organized crime (*see*, NYS Legis Findings, L 1970, ch 1003[3], [4]). The consolidation intent embodied in the State's OCTF statute is further evidenced by the provision for the appointment of one special Deputy Attorney-General to the leadership responsibility for this whole field of endeavor. This officer, appointed by and serving at the pleasure of the Governor and Attorney-General (Exec. Law §70-a[2]), is thus publicly accountable generally and to them specifically as the State's chief executive and highest elected law enforcement official. I can find no New York legislative trend creating statewide special prosecutors enjoying the dual specific legislative mandate that the Director of the OCTF has (*see*, Executive Law §70-1[2], CPL 700.05[5]). Indeed, the Governor's formal Budget Message for 1990-91 specifies an opposite trend: elimination of the Special Prosecutor for Corruption, in existence since 1972 (State Budget, p 103).

Another defense prong of attack is that a lack of "political accountability" should deprive the OCTF Director of eavesdrop warrant applicant status. Congress did express an intent that applicants "be limited to those responsive to the political process" (*United States v. Giorando*, 416 US 505, 520). However, the purpose of this requirement is to ensure that "[s]hould abuses occur, the lines of responsibility lead to an identifiable person" (Senate Report, at 2185). The legislative scheme of New

York's Executive Law §70-a, plus the requirement of authorization running to the Director from the regularly elected Attorney-General (CPL 700.05[5]), have embodied in State law a sufficient assurance in this respect. Moreover, the Federal applicants enumerated in the Federal prosecutorial roster have no more political accountability than New York State's OCTF Director (*see*, 18 USC §2516[1] [which includes "any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General" among authorized applicants]).

Some defendants also complain that the OCTF Director's eavesdrop warrant application authority is derived from an "overbroad delegation" of the Attorney-General's power. But the Director's general authority is not "derived"; rather, it is separately secured through a State legislative grant (*see*, Exec. Law 70-a), as is the independent warrant application power (*see*, CPL 700.05[5], *see also*, *B.T. Prods., Inc. v. Barr*, 44 NY2d 226, 232, n 19; *Matter of Sussman v. New York State Organized Crime Task Force*, 39 NY2d 227, 230). The nonself-executing statutory status even requires a confirmatory express authorization from the Attorney-General, which was satisfied here by a letter from the Attorney-General to the Director. The designation and delegation is therefore not an abdication of responsibility, as has been argued, but a reinforced, checked and balanced, statutory and official conferral of appropriate authority. This is especially so under New York's unconventional scheme where the Attorney-General is not traditionally or by statutory empowerment a general prosecuting official – which should be a sufficient answer to the dissent's duplicativeness argument (*Dells Pietra v State of New York*, 71 NY2d 792, 796-797).

The State and Federal statutes are specific and in harmony, and we therefore hold the New York applicant authorization statute valid. Our analysis in this respect is neither broadbrushed nor strained but quite straightforward. It is also buttressed by the failure of defendants to fulfill their burden of demonstrating the invalidity of CPL 700.05(5) beyond a reasonable doubt (*see, People v. Pagnotta*, 25 NY2d 333, 337). In sum, we uphold the invocation by the OCTF Director of his plain authority vested in that office under the State statute to secure the pertinent eavesdrop warrants; we find that statute consistent with the congressional enabling statute and intent; and we decide in consequence of those threshold determinations that the evidence garnered pursuant to court-ordered warrants was properly held admissible and not suppressible.

Defendants additionally claim, however, that the eavesdrop tapes and all other evidence derived from them should have been suppressed because of alleged noncompliance with the immediate sealing requirements of CPL 700.50(2). In six of the twenty-four warrant expiration periods, tapes were not sealed "immediately". On five of these six occasions, the period expired at midnight on a Saturday night and, in pre-expiration meetings, the issuing Justice directed that the tapes be presented for sealing on the first business day after expiration. In the sixth instance, the prosecutor immediately presented the tapes for sealing but was informed by court officials of the issuing Justice's unavailability at that particular moment. The prosecutor complied with the issuing Justice's direction to return the next day and the tapes were then sealed.

While we relax none of the burdens initially placed on the People to explain a tape-sealing delay (*People v Winograd*, 68 NY2d 383, 394), we conclude on this record that the offered explanations satisfied that burden (*see, People v. Edelstein*, 54 NY2d 306, 310). Both lower courts have so held, and we have no basis to conclude as a matter of law that the sealing requirement aspect of the statute was violated. *People v Winograd (supra)* offers little sanctuary to defendants because there the prosecutor knew in advance of the issuing Justice's impending absence on the expiration date and the prosecutor made no alternative sealing arrangements in an effort to comply with the immediate sealing protection. Here, by contrast, the prosecutor in each instance made alternative arrangements in advance with court approval and directions, and sealing was accomplished "immediately" within the intendment of the statutory mandate. To rule otherwise would sacrifice substance for form and not advance the salutary and necessary purposes of the sealing protections in this statue (*People v Ronning*, 137 Ad2d 43, 48-49, *lv denied* 72 NY2d 866).

The dissent's disagreement with us on this point is particularly unavailing in view of the respect, not superseder, given *People v Edelstein (supra)* in *People v Winograd (supra*, at 394-95), which neatly and supportively harmonizes our recent relevant precedents.

Since the arguments raised do not render the affirmed judgments of conviction infirm in any cognizable respect, the orders of the Appellate Division should be affirmed.

People v Vespucci – No. 4

People v Private Sanitation – No. 5

People v. Jamaica Ash – No. 6

Titone, J. (dissenting):

The majority's decision to uphold the provision of CPL 700.05(5) authorizing eavesdropping warrant applications by the Director of the Organized Crime Task Force ("OCTF") is not supported by the language of the governing federal statute (18 USC § 2516[2]), the underlying statutory purpose or the relevant case law. Moreover, the majority's broad-brush approach, which is based largely on the general crime-prevention goals of the two statutes and on an attempted analogy to the provisions governing warrant applications by federal law enforcement officials, is flatly inconsistent with the "narrow reading" of the Omnibus Crime Control Act that we have previously adopted because of "our own sensitivity to the dangers inherent in electronic eavesdropping" (*People v Shapiro*, 50 NY2d 747, 764). Since I cannot subscribe to what I consider to be the majority's strained efforts to uphold the challenged statute, I respectfully dissent.

Under the Omnibus Crime Control Act, only two classes of law enforcement officers may be designated by the states as proper applicants for court-authorized electronic eavesdropping warrants: the state's "principal prosecuting attorney" and the "principal prosecuting attorney of any subdivision [of the state]" (18 USC § 2516[2]). The language is plain and unambiguous. Giving it its most natural reading, the statutory language

denotes a *single* individual, more particularly the individual entrusted, by the state as a whole or by each of its political subdivisions, to oversee the People's interest in the prosecution of crime. In the words of the Senate Report on the then-proposed statute, it was "the chief prosecuting officer of the State" that Congress had in mind (S. Rep. No. 1079, 90th Cong, 2d Sess., reprinted in 1968 US Code, Cong & Admin News 2112, 2187 [hereinafter "Senate Report"]). Although allowance was made for warrant applications by "the principal prosecuting attorney at the next political level of a State," e.g., the county, the provision "d[id] not envision a further breakdown" (*id.*).

Thus, under both the unadorned statutory terms and the official explanation of how those terms were intended to be used, it is abundantly clear that Congress did not intend to permit the authority to apply for electronic eavesdropping warrants to be split between two different prosecuting officials both of whom operate at the state level of government. CPL 700.05(5), which permits applications by either the State Attorney General *or* the OCTF Director, who are both state-level prosecuting attorneys, is therefore not in conformity with 18 USC § 2516(2) and, for that reason, cannot be sustained (*see, People v. Shapiro, supra*).

The majority's position is not advanced by its assertion that "[under] New York's unconventional scheme * * * the attorney general is not traditionally or by statutory empowerment a general prosecuting official" (slip op. at 7). Indeed, the "unconventional scheme" that the majority posits was expressly contemplated by the drafters of the Senate Report:

> In most States, the principal prosecuting attorney of the State would be the attorney general. The important question, however, is not name but function. The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State. Who that officer would be would be a question of State law. *Where no such office exists policymaking would not be possible on a statewide basis; it would have to move down to the next level of government. In most States, the principal prosecuting attorney at the next political level of a State, usually the county, would be the district attorney, State's attorney, or county solicitor.*

(Senate Report, at 2187 [emphasis supplied]). Thus, if the majority's assertion were true, it would lead only to the conclusion that the Attorney General is not a proper designee under 18 USC § 2516(2). It certainly does not support the proposition that the OCTF Director, whose jurisdiction is even narrower than the Attorney General's, is fairly characterized as "the chief prosecuting officer of the State" or its *functional* equivalent (*see*, slip op, at 4, 5).

Even apart from the clear import of the statutory language and legislative history, it is apparent that CPL 700.05(5)'s designation of the OCTF Director as a permissible applicant is inconsistent with the goals of the federal Act. Again, according to the Senate Report, "[t]he intent of the proposed provision [18 USC § 2516(2)] is to provide for the *centralization* of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State" (Senate Report, *supra*, at 2187 [emphasis supplied]). The purpose of such centralization, in turn, was to "avoid the

possibility that divergent practices might develop" (*id.*, at 2185).[1]

Plainly, the concept of "centralizing" the authority to apply for eavesdropping warrants in a "chief prosecuting attorney" is inconsistent with allowing applications at the state level to be made by *either* the Attorney General or the OCTF Director. Similarly, it is difficult to see how the goal of avoiding divergent practices may be reconciled with a state statute that permits decisions "in the area of the use of electronic surveillance" to be made in two separate offices having two separate sources of authority. In this regard, it is important to point out that although the OCTF Director operates nominally within the Attorney General's office, he is, as the Appellate Division noted below, "vested with the authority to act with relative independence in conducting investigations within his

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[1] Contrary to the majority's suggestion, the argument that the statute contemplates only *one* official at each level of local government does not turn on the drafters' use of the definitive article "the" (slip op, at 3-4). To the contrary, the very concept of "centralizing" authority, which figured so prominently in the drafters' intentions, denotes a singular point of authority. I would also note that the majority's own reliance on the grammatical construction that the Senate Report drafters used in urging that states should "specifically designate the principal prosecuting *attorneys* empowered to authorize interceptions" (Senate Report, *supra*, at 2189 [emphasis supplied]; *see*, slip op, at 4) is unavailing. Since 18 USC § 2516(2) permits designation of "principal prosecuting attorneys" at both the state and political subdivision levels of government, the use of the plural term "principal prosecuting attorneys" is, in this context, hardly surprising. Certainly, it does not support the majority's conclusion that more than one "principal prosecuting attorney" at the state level of government was contemplated.

jurisdiction" (144 AD2d, at 54). Indeed, the Director's own brief submitted on this appeal asserts that his power to investigate cases involving organized crime "is derived directly from the various provisions of section 70-a of the Executive Law [the enabling legislation], and not from delegation by the Attorney General." In light of the specialized mandate of the OCTF Director and the absence of direct accountability between the Director and the Attorney General, it seems likely that the former's priorities and policy choices will differ from those of the regular law enforcement officials within the latter's office, leading to precisely the type of conflicting and "divergent" practices that Congress was seeking to prevent.[2]

The majority's heavy reliance on the parallel provisions governing federal warrant applications (slip op, at 4) is also misplaced. It is true, as the majority notes, that 18 USC § 2516(1) authorizes warrant applications by a number of high-level federal officials (*see, also,* DC Code

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[2] The majority relies, in part, on "the requirement of authorization running to the Director from the regularly elected Attorney General" (slip op, at 6). However, as the majority later acknowledges, once such authorization is received, the Director's powers are "independent" and not "derived" (slip op, at 7). Furthermore, the authorization contemplated by CPL 700.05(5) is not given on a case-by-case or application-by-application basis. Rather, it is a blanket authorization empowering the OCTF Director to apply for electronic eavesdropping warrants in those cases falling within his statutory jurisdiction. Thus, the important discretionary decisions, such as when to make applications and how to administer the wiretapping program within his department, are left to the Director, without regard to whether the underlying policies conflict with those followed in the investigative branch of the Attorney General's office.

Anno § 23-546[a] [including as permissible applicants the United States Attorney or any designated "investigative or law enforcement officer"]).[3] However, the listed officials were selected by Congress specifically because there were "lines of responsibility leading to *an identifiable person*" (Senate Report, *supra*, at 2185 [emphasis supplied]). Further, as noted by the United States Supreme Court, the listed officials, all appointed directly by the President of the United States, can fairly be said to be "responsive to the political process" (*United States v Giordano*, 416 US 505, 520). The same cannot be said about the OCTF Director, who is appointed jointly by both the Governor and the Attorney General (Executive Law § 70-a[2]). Contrary to the majority's assertion (slip op at, 6), this system of joint appointment does not promote political accountability, but rather operates to insulate the OCTF Director from direct accountability to the political process precisely because it splits "the lines of responsibility" between two, separately elected appointing authorities.[4]

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[3] 18 USC § 2516(1) provides that electronic eavesdropping warrant applications may be made by "[t]he Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorney General, any acting Assistant Attorney General or any [specially designated] Deputy Assistant Attorney General in the Criminal Division."

[4] The split in the lines of accountability is particularly significant in our State, where the offices of Governor and Attorney General have often been held by members of different political parties or by individuals with very different political viewpoints. Further, the independence of the New York State Attorney General vis-a-vis the Governor is a well-known and long-standing tradition.

Finally, unlike the majority, I am not persuaded by the supposed consonance between the purpose of section 2516(2) of the federal Omnibus Crime Control Act and that of New York State legislation creating the Organized Crime Task Force (Executive Law § 70-a). The purpose of the latter was to enhance the State's law enforcement capabilities by centralizing law enforcement efforts in a particular class of cases, i.e., those involving organized crime, in a single prosecutorial entity (*see*, Legislative Findings, L 1970, c 1103, § 1). The purpose of the former, in contrast, was to minimize the potential for prosecutorial abuse of electronic eavesdropping by centralizing the warrant application authority in a single, politically responsible official. The only point of commonality is that the statutes' respective goals are to be accomplished through centralization. Such a superficial common ground is certainly not sufficient to bring CPL 700.05(5) into compliance with the controlling federal statute.

The implications of the majority's reliance on the "centralization" factor are profound and disturbing. Because centralized administration of law enforcement is often considered more effective than local prosecutorial efforts, with their inherent boundary restrictions, there is a perceptible recent legislative trend toward creating specialized prosecutors, whose authority transcends local borders, to address particular types of crimes. Given this trend, the majority's approval of the statutory provision at issue here creates a very real risk that in the future there will be a proliferation of special-interest prosecutors who are legislatively authorized to obtain electronic

eavesdropping warrants. The office of the Special Narcotics Prosecutor for New York City, for example, has some of the same salient characteristics as the OCTF Director, in that it too was created because of a perceived need to "centralize" law enforcement efforts in an area of urgent concern, i.e., drug trafficking (*see*, Judiciary Law § 117-a). Further, like the OCTF Director, the Special narcotics Prosecutor operates nominally within the office of a conventional prosecutorial authority (a District Attorney serving one of the counties within New York City), but is collectively appointed by – and therefore responsible to – several elected officials, namely, the District Attorneys of all five of the counties within New York City (*id.*, § 177-c). Under the majority's rationale, these traits would seem to render the Special Narcotics Prosecutor as eligible for designation as a permissible eavesdropping warrant applicant as the OCTF Director.

In summary, as I read the language and published legislative history of 18 USC § 2516(2), for state-level investigations, the states are limited to designating a *single* prosecutorial official, specifically, their chief prosecuting officers, to apply for electronic eavesdropping warrants. Permitting multiple designations at the state level of special-interest prosecutors such as the OCTF Director, whose functions are "centralized" by subject matter, is inconsistent with the federal goal of centralizing the policy and practices "in the area of the use of electronic surveillance" *without regard to the subject matter of the investigation* (Senate Report, *supra*, at 2187). For that reason, I conclude that CPL 700.05(5)'s designation of the OCTF Director cannot be upheld under the doctrine of federal pre-emption (*see, People v. Shapiro, supra*).

While I would reverse and suppress all of the electronically acquired evidence primarily because of the OCTF Director's reliance on an unconstitutional source of authority, I cannot help but comment on defendant's other argument for suppression, i.e., the People's failure to comply with the statutory sealing requirements (CPL 700.50). The majority has held that the delays in sealing here were acceptable not because of any reasonable excuse offered by the prosecutor, but rather because, in contrast to the circumstances in *People v Winograd* (68 NY2d 383), "the prosecutor [here] made alternative arrangements in advance with court approval" (slip op, at 9). I cannot agree, however, that the statutory requirement of prompt sealing may be waived or dispensed with upon judicial approval (*see*, Bellacosa, Practice Commentaries, McKinney's Consol Laws, Book 11A, CPL 700.50, at 504 [distinguishing between issuing judge's broad discretion to require progress reports and mandatory nature of return and sealing requirements]). Plainly, *People v Edelstein* (54 NY2d 306), on which the majority relies, cannot be considered helpful in light of the limitations that were placed on that case's significance in *People v Basilicato* (64 NY2d 103, 116-117) and *People v Winograd* (*supra*, at 399-395 [sic]). Indeed, to the extent that *Edelstein* may be construed to permit delays in sealing occasioned solely by the issuing Judge's unavailability, it has been superseded by the holding in *Winograd*, which required the People to "offer [an] explanation for their failure to have the supervising Justice transfer authority to an available Justice" (68 NY2d, at 394, *supra*). Whether permission or approval by the issuing Judge is a sufficient "explanation" is not answered by either *Edelstein* or

Winograd. As a matter of common sense, however, it seems to me that if an unexcused prosecutorial delay in bringing tapes to be sealed would constitute a ground for suppression in a given case, a judicial directive permitting such delay would also be error necessitating suppression.

Accordingly, I dissent and cast my vote to reverse the orders of the Appellate Division and suppress the evidence obtained as a result of electronic surveillance.

* * *

In each case: Order affirmed, Opinion by Judge Bellacosa in which Chief Judge Wachtler and Judges Simons, Kaye and Hancock concur. Judge Titone dissents and votes to reverse in an opinion. Judge Alexander took no part.

Decided February 15, 1990

MEMORANDUM

Ind. #'s 2626/83, 1472/84
1474/84, 1475/84, 1476/84, 1477
1479/84 and 1481/84

COUNTY COURT, SUFFOLK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK vs PRIVATE SANITATION INDUSTRY ASSOCIATION OF NASSAU/ SUFFOLK, INC., et al, Defendants	BY JOHN V. VAUGHN, J.C.C. DATED October 10, 1986

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ANTHONY CORALLO, et al

Defendants

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JAMES J. CORRIGAN, JR.,

Defendant

THE PEOPLE OF THE STATE OF NEW YORK

-against-

SALVATORE AVELLINO, JR., FIORI PERSICHELLI, ANTHONY VESPUCCI, JAMES J. CORRIGAN, JR., and PRIVATE SANITATION INDUSTRY ASSOCIATION OF NASSAU/SUFFOLK, INC.,

Defendants

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ARTHUR ROMERSA and VITO BIONDO,

Defendants

THE PEOPLE OF THE STATE OF NEW YORK

-against-

PRIVATE SANITATION INDUSTRY ASSOCIATION OF NASSAU/SUFFOLK, INC., JAMES J. CORRIGAN, JR., and DAVID SCANLON,

Defendants

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ARTHUR ROMERSA,

Defendant

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JO-ANN RAIA,

Defendant

THE PEOPLE OF THE STATE OF NEW YORK

-against-

PETER FRANCIS FINNERTY,

Defendant.

TO: Ronald Goldstock, Deputy Attorney General
State of New York, Organized Crime Task Force
by George F. Bradlau, Asst. Deputy Atty Gen.
226 Westchester Avenue
White Plains, N. Y. 10604

GALLOP, DAWSON & CLAYMAN, Esqs.
by Samuel Harris Dawson, Esq.
Lead Counsel for the Defendants
305 Madison Avenue
New York, N. Y. 10165

The defendants in the above nine indictments have joined in this motion to supress [sic] electronically intercepted conversations upon the ground that the People improperly executed the warrants by failing to minimize the interception of non-pertinent and privileged communications.

In these indictments, the defendants are charged with the crimes of conspiracy, 5th degree, bribery, 2nd degree, bribe receiving, 2nd degree, official misconduct, coercion, 1st degree, grand larceny, 2nd degree, commercial bribe receiving, violations of the Donnelly Act, perjury, 1st degree, and criminal contempt, 1st degree. The electronic surveillance was conducted over a 13-month period on approximately 29 different telephone lines and instruments, as well as the monitoring of oral conversations in a Jaguar automobile and the Santoro Beverage Co. The investigation was conducted in order to examine a broadly based conspiracy in the Long Island Carting Industry.

The thrust of this joint application is that there were allegedly massive failures of minimization by the OCTF's monitoring officers throughout every wiretap, every bug

and virtually every day of the eavesdropping. This massive failure is purportedly evidenced by (1) continued recordings of privileged conversations; (2) the listening to non-pertinent conversations in their entirety; and (3) the failure to record every conversation that was interrupted, as well as the frequent failure to note on the line sheets what was actually recorded. The defendants contend that these errors support the conclusion that the OCTF either intentionally or negligently failed to supervise this eavesdropping surveillance.

In support of their position, the defendants have submitted over 1100 pages of documentation which allegedly reflects a minimum of 3,000 hours of labor in listening to and analyzing 800 hours of tape recorded conversations. In their documentation the alleged violations of the minimization requirements are broken down into three categories for each of the telephone numbers involved, as well as for the Santoro bug. These categories consist of (1) privileged communications; (2) non-pertinent communications; and (3) errors in execution. There is no breakdown for the Jaguar bug.

STANDING

Initially, the People contest the standing of the defendants to make this motion. It is well-established that the minimization requirement is rooted in the Fourth Amendment's ban upon unreasonable search and seizures, and that a defendant has no standing to assert the Fourth Amendment rights to another (*People v. Edelstein* 54 NY2d 306; *Rakas v. Illinois* 439 US 128, 58 L.Ed.2d 387).

A defendant has the necessary standing if he has a proprietary interest in the telephones or the premises or was a party to the conversation involved (*People v. Sergi* 96 AD2d 911; *People v. Konyack* 99 AD2d 588; *People v. Gallina* 104 AD2d 953). In this case the defendants have made no reference to the issue of standing in their moving papers, and it is apparent that not all of the defendants have the requisite standing to attack all of the conversations in issue. However, in a letter subsequently submitted by lead counsel, the defendants acknowledge their obligation to establish the requisite standing and allege that they will do so for each defendant at any hearing held on this application.

MINIMIZATION

The concept of minimization derives its origins from the fact that electronic surveillance is a "search" and therefore, any eavesdropping must be conducted in strict compliance with the Constitution. Section 700.30, subd. 7 of the CPL sets forth the minimization standard in this State. It provides, in part:

> "An eavesdropping warrant must contain
>
> * * *
>
> "7. A provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article . . . "

This provision is almost identical to its Federal counterpart (18 USC, Sec. 2518, subd. 5) and its contents are

appropriately included in each of the eavesdropping orders issued.

Neither the language of the statute nor anything in the concept of minimization requires that all non-pertinent communications be free from interception in their entirety. Such a standard would be unrealistic and impossible to satisfy (see *United States v. Bynum* 485 F.2d 490, 500, vacated on other grounds 417 US 903, 41 L.Ed.2d 209). Minimization is a good faith and reasonable effort to keep the number of non-pertinent calls intercepted to the smallest practical number (*People v. Floyd* 41 NY2d 245, 250, cf. *Scott v. United States* 436 US 128, 56 L.Ed.2d 168).

On the issue of minimization, the People bear the burden of coming forward to show the legality of the police conduct in the first instance, but the ultimate persuasion on the motion to supress [sic] remains upon the defendants (*People v. Di Stefano* 38 NY2d 637, 652; *People v. Rezey* 107 AD2d 850). The People's initial burden on this issue may be satisfied by demonstrating that they had established procedures to minimize the interception of non-pertinent or privileged communications and that a conscientious, good faith effort was made to follow those procedures. (*People v. Floyd*, supra).

Procedures by which minimization is generally accomplished include such practices as: proper instructions to the monitors; pre-search guidelines; ongoing supervision by supervising officers including prosecutors; ascertainment of patterns of use; and spot monitoring (Carr, The Law of Electronic Surveillance, Sec. 5.7[c]). In some instances, the People have met their initial burden on the motion by (1) affidavits from supervising attorneys or

monitoring agents describing the minimization procedures utilized (*United States v. Cirillo* 499 F.2d 872, 880-81, cert. denied 419 US 1056, 42 L.Ed.2d 653 (2); the logs kept by the monitoring agent (see *People v. Rezey* 107 AD2d 850); (3) periodic reports to the court during the period of eavesdropping (see *People v. Floyd*, supra; *United States v. Cirillo*, supra); and (4) the minimization instructions given to the monitoring agents (*People v. Rezey*, supra).

In this case, the court finds that People have met their initial burden of establishing a procedure for minimizing non-pertinent and privileged communications. In their affidavits and supporting documents they have established that prior to any surveillance, the monitoring officers were instructed as to the requirements of minimization in general, and as to the nature of the investigation and the requirements of that particular eavesdropping order. Written minimization standards were distributed to and required to be read, by all monitoring officers. These guidelines were supplemented by both oral and written instructions. Telephone numbers of the relevant supervisors were available at the site, and a principal investigator was placed in charge of field operations for direct day-to-day supervision. Monitors were instructed that they were to determine the relevancy of any conversation within 90 seconds or sooner, and that upon termination of the monitoring, they could subsequently spot-monitor that conversation unless the call was deemed privileged.

In addition, the supervising prosecuting attorney regularly reviewed the line sheets and listened to the

recorded conversations. It is true that except for the Jaguar and Santoro bugs, there was no provision for judicial supervision of the wiretaps through the submission of regular program reports to the court (see CPL 700.50, subd. 1). While such judicial supervision would have been strong evidence that the minimization requirements had been satisfied (*People v. Floyd*, supra, page 253; see *United States v. Quintuna* 508 F.2d 867, 875) requiring such reports lies within the discretion of the issuing justice. In this case, the People explain that they had offered to submit such progress reports, but the issuing justice declined the offer allegedly because he felt that the numerous amendment and extension applications that would be submitted to him would allow him to maintain sufficient supervision. The People also explain that they made the daily log sheets available to the issuing justice.

Nevertheless, the defendants, by means of their massive documentation, have attempted to establish that the required minimization did not, in fact, occur. Moreover, they contend that this evidence establishes that the attorney general, either intentionally or negligently, failed to properly supervise the surveillance operation.

The determination as to whether minimization has been achieved must itself be made on a case by case basis (*United States v. Turner* 528 F.2d 143, 156; *People v. Floyd*, supra). Among the many factors to be considered by the court are (1) the nature of the offense being investigated and the purposes of the investigation; (2) the type and location of the device (i.e., bug or telephone) and the type of speakers, as well as the nature of the conversations to be expected; (3) the suspects' awareness of the possibility

of the surveillance; (4) the monitoring officers' implementation of accepted minimization techniques; (5) the use of codes or cryptic language, and (6) the degree of judicial supervision, if any, (Car, the Law of Electronic Surveillance, §5.7[d] Fishman, Wiretapping and Eayesdropping, §153; see also *People v. Floyd*, supra; *Scott v. United States*, supra; *People v. Brenes* 42 NY2d 41, 46-7).

Where, as in the present case, the investigation is focusing on a wide spread conspiracy, monitoring agents must be given more latitude in order that they may determine the scope of the criminal enterprise as well as the identity of the participants (*People v. Floyd*, supra, *Scott v. United States*, supra). A similar difficulty in determining the pertinency of a conversation arises when the parties are aware of the possibility of surveillance and resort to cryptic or coded language. Ambiguous conversations often make it impossible to determine relevancy until the completion of the call (*Scott v. United States*, supra). In this case the tapes reveal a number of calls where the parties expressed an awareness of the wiretapping, and are replete with instances of coded, cryptic or ambiguous language.

In reaching their conclusion that minimization was not achieved, the defendants have used a 30 second rule in their analysis of the tapes, i.e., the monitoring agents were given a 30 second grace period in which to determine the relevancy of a conversation before the defendants would consider it a breach of the minimization requirement. The 30 second rule was not applied to their analysis of the calls involving privileged communications (husband and wife, attorney-client) or errors in execution

(Category 3) upon the belief that privileged communications should not be intercepted at all and errors in execution are not justified by the time interval involved.

Monitoring agents are not clairvoyant and some degree of intrusion is obviously necessary to make the requisite determination of pertinency. There is no hard and fast rule as to the period allowed. More time is obviously permitted in a complex, multi-party conspiracy, or where coded or cryptic language is used.

In this case, the People imposed a 90-second period on their monitors in their pre-surveillance guidelines and instructions. On the other hand, courts have held that recording of calls of less than 2-3 minutes duration should be disregarded because of the difficulty of making a determination of pertinency in such a short period of time (*People v. Floyd* 41 NY2d 245, 253; *United States v. Bynum* 360 F.Sup. 400, aff'd 485 F.2d 490, vacated other grounds 417 US 903, 41 L.Ed.2d 209). In *United States v. Hinton* (543 F.2d 1002, cert. denied 97 S.Ct. 493), the court approved a 5 minute period of initial monitoring because of the use of coded langauge [sic] in the conversation.

Also bearing on the length of this initial grace period is the period of the investigation in which it occurred (beginning – end), as well as the nature of the participants to the conversation. More time is permitted in the early phase of an investigation (see *United States v. Chavez* 533 F.2d 491) and when a party named in the eavesdropping warrant is a participant in the conversation (*People v. Floyd*, supra).

The defendants are correct in their assertion that privileged communications are not subject to interception

(CPL 700.30, subd. 7). This is not to say, as defendants assert, that these communications are not subject to some limited intrusion. It has been held that an attorney's conversation with his client, a target of an investigation, may be overheard until the monitoring agents determine that the attorney is not participating in the client's criminal activities (*United States v. Hyde* 574 F.2d 856-870). Similar limitations apply to the spousal privilege (*People v. Watkins* 89 Misc.2d 870, aff'd 63 AD2d 1033).

In this case, a particular problem existed in the area of spousal privilege. One of the spouses was also a named party in one of the warrants, and two others were employed by the named parties in their businesses. These conversations, at times, mixed family and business affairs and thus, some interception was inevitable. Moreover, when some attorney-client conversations were intercepted, the monitoring officers were specifically instructed not to do so and, in one instance, the matter was reported to the issuing justice.

Although statistical evidence is not determinative of the minimization issue, it is relevant in evaluating compliance with the procedures established to restrict the interception of non-pertinent calls (*People v. Floyd* 41 NY2d 245, at 252; *United States v. Armocida* 515 F.2d 19, 42). The People have not produced their own statistical evidence but, for the purpose of this motion, have relied upon the documentation furnished by defendants. The breakdown of this documentation discloses the following percentage breakdown of Category 1 (privileged communications), and Category 2 (non-pertinent communications):

Total Eavesdropping	Total Challenges (5616)			Break down by Category			
	%			Cat 1 - priv. (339)		Cat 2 non-pert. (527)	
	30 sec.	90 sec.	2 min.	% 90 sec. (71)	2 min. (47)	90 sec. (1870)	2 min. (1273)
Intercepts (40,517)	13.9	4.8	3.3	.17	.1	4.6	3.1
*Conversations (33,400)	16.8	5.8	3.9	.2	.14	5.5	3.8

(*Conversations – total interceptions less busy signals, no answers, wrong numbers, answering machines [even though these could result in pertinent interceptions] tape recorded messages, misdials, no rings, telephone number changed, dialer hung up, call received hung up, incomplete dial and no connection.)

A separate analysis of each of the wiretaps discloses a similar result (People's affidavit, pages 35-45). Moreover, a substantial portion of defendants' objections are classified as "BM", i.e., "Bad or Poor Minimization". Nevertheless, whether the minimization was bad or poor, there was some monitoring or minimization conducted. If these "BM" objections of phone calls of at least two minutes duration (481) are deducted, the percentage of alleged violations of minimization is lowered even further (2.1%) (see People's affidavit, page 47). It is apparent that proper minimization was achieved in this area (see *People v. Cologero* 75 AD2d 455; *United States v. Armocida* 515 F.2d 29).

An analysis of the alleged 680 violations of category 3 – "Errors in Execution" leads to a similar conclusion. The thrust of this objection was that the monitors listened without recording, thus violating the eavesdropping order and rendering valueless the use of the line sheets as evidence to establish lawful minimization.

The alleged errors in execution can be divided into five general categories: (1) conversations on the line sheets, but not on the tapes; (2) unexplained blank tapes; (3) interceptions not minimized or spot monitored (NM/NSM). In this category fall those claims of "false minimization" where the monitors wrote NPMO (not pertinent-machine off) when they knew the conversation was about to end; (4) recording begins in mid-conversation; (5) conversations on tape, but not on line sheet. The following chart sets forth the People's explanations for these five categories, together with explanations for two other type objections not falling within the categories:

MEMORANDUM

CATEGORY	# Of OBJECTIONS	EXPLANATIONS Unfounded; Mechanical Difficulty		Misc.	Unexplained Monitor e
1. Conversations on line sheets – not taped	112	70	3	3	36
2. Unexplained blank tapes	26	2	4	–	–
3. NM/NSM	119	47	1	51 (under 90 sec) 19 (named parties)	1
4. Mid-conversation	282	35	57	35 (new tapes) 153 (re-activated upon termination)	2

MEMORANDUM

CATEGORY	# Of OBJECTIONS	EXPLANATIONS Unfounded; Mechanical Difficulty		Misc.	Unexplained Monitor e
5. On tape – no on line sheets	57	27	5		25 prop recorde
SUB-TOTAL:	596	181	90	261	64
6. Errors in line sheets (not improperly intercepted)	20	20			
7. Miscellaneous	64			49	15
TOTAL:	680	201	90	310	79

The 15 monitor errors on Line 7 occurred while the agent was monitoring a number of lines. At that time, when he secured the lines and terminated interception for the day, he negligently failed to turn off the machine intercepting telephone #265-5290, resulting in the recording of 15 phone calls without any minimization. However, based upon either the total number of interceptions or conversations, the number of errors in execution is statistically insignificant. In short, the evidence does not support the alleged claim of an intentional or negligent massive intelligence effort in violation of the minimization requirements.

In addition, the essential criticism of the defendants regarding the execution of the "bug" orders is that monitoring agents listened without recording. It is true that the minimization requirements applicable to wiretaps are equally applicable to interception of oral communications (bugs) (CPL 700.30, subd. 7, see *United States v. Harvey* 560 F.Sup. 119), but there are a number of distinctions between the requirements for executing a "wiretap" order and a "bug" order (*United States v. Clerkley* 556 F.2d 709, 717, cert. denied 436 US 930; Fishman, Wiretapping and Eavesdropping, Sec. 157).

Some of the differences between a "bug" as opposed to a telephone tap are: (1) the parties shift from topic to topic in the course of the same conversation; (2) "bugs" pick up all sounds, including radios, car noises and simultaneous conversations among several people; (3) without listening it is often impossible to know if anyone is either present or talking; and (4) "bugs are often placed in locations where legitimate business as well as criminal activity occurs (see *United States v. Clerkley*, supra; *United*

States v. Ford 553 F.2d 146; *United States v. Feldman* 606 F.2d 673, cert. denied 445 US 961).

In this case, procedures were established to minimize the interceptions on the "bugs" as well as the wiretaps. Written and supplemental oral minimization instructions were given and all monitoring agents were directed to read the pertinent eavesdropping orders and applications. It is true, as the defendants suggest, that the "bug" (Santoro) was on during periods when no conversation, but only music or other sounds were recorded. However, as soon as any conversations were heard, the conversations were recorded, and if non-pertinent, terminated, with subsequent spot monitoring to assure that the subject of any conversation did not turn to criminal matters. The court finds no error in this procedure.

In *People v. Brenes* (42 NY2d 41) the court considered the nature of the remedy to be imposed where minimization is not achieved. The Court noted three possible dispositions – (1) total supression [sic]; (2) supression [sic] of only those conversations that should not have been intercepted; and (3) the "double standard" approach where the extent of the remedy would rest upon whether minimization was merely unsuccessful, or was not attempted at all. The Court stated:

> "However, though no 'blanket rule' need be stated, a distinction must be drawn between, on the one hand, cases where, as here, the order is executed as if in defiance of the existence of statutory and decisional minimization requirements, and on the other, cases where in retrospect it appears that the minimization efforts have merely fallen short. While an unlimited

> intrusion requires a remedy as broad as the unlawful action, a limited one may not."

While there is some conflict in the decisions, most other courts have held that partial separation of non-pertinent and improperly intercepted conversations is all that is required when there is no pattern of, nor intentional disregard of, the minimization requirements (*United States v. Sisca* 361 F.2d 735, 746-47, aff'd on other grounds, 503 F.2d 1337, cert. denied 419 U.S. 1008; *People v. Solomon* 75 Misc.2d 847; cf. *Scott v. United States* 436 U.S. 128, 139, 56 L.Ed.2d 168; see *United States v. Principie* 531 F.2d 1132, 1139; *United States v. Cirillo* 499 F.2d 872, 881 n.7, cert. denied 419 U.S. 1056; contra *People v. Castania* 73 Misc.2d 166). This result is based, in part, upon an analogy to search warrants where the seizure of some items beyond those described in the warrant does not generally require separation of the items specified (*Marron v. United States* 275 U.S. 192; 72 L.Ed.231; cf. *Coolidge v. New Hampshire* 403 U.S. 443, 29 L.Ed.2d 564) as well as upon the fact that the statutory scheme authorizing the issuance of the eavesdropping warrants provides numerous safeguards to protect the individual's rights (*United States v. Sisca*, supra).

In this case, there is no evidence of a deliberate, intentional or pervasive violation of the minimization requirements. The affidavits of the assistant deputy attorney general, the principal investigators, and defendants' own documentation disclose that the monitoring agents exhibited good faith and reasonable efforts to keep the number of non-pertinent and privileged calls to the smallest practicable number.

Nevertheless, there were some non-pertinent conversations intercepted. Thus, upon a proper showing of standing, and a specification of the pertinent conversations involved, supression [sic] might be in order. However, the instant motion is directed at total supression [sic] of all electronically intercepted conversations upon the ground that the People improperly failed to minimize. The court finds no such violation of the minimization requirements.

Accordingly, the motion to supress [sic] is denied.

JOHN V. VAUGHN, J.C.C.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND
JUDICIAL DEPARTMENT

3967j
J/hu
Argued - October
27, 1988

___ AD2d ___

MOSES M. WEINSTEIN, J.P.
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
SYBIL HART KOOPER, JJ.

1112E
1113E
2744E-2744ZE

The People, etc., respondent, v Anthony Vespucci, James J. Corrigan, Jr., Charles Cannizzaro, MCM, d/b/a Island Carting Co., Enviro, d/b/a Island Carting, Nicholas Ferrante, Unique Sanitation, John Haynes, Robert Schuman; Standard Commercial Cartage, Inc., Vincent Montesano, Vinnie Monte's Waste Systems, Inc., Frank Rotundo, Wayside Carting Inc., a/k/a Wayside Sanitation, Sail Sanitation, Inc., and Sanicare, appellants.
(Ind. No. 2626/83)

The People, etc., respondent, v Salvatore Avellino, Jr., Salem Sanitary Carting Corp., Thomas Ronga, Detail Carting Company, Jamaica Ash and Rubbish Removal Company, Inc., appellants.
(Ind. No. 1472/84)

OPINION &
ORDER

PRIVATE
SANITATION
INDUSTRY
ASSOC., N/S INC
1707-20
VETERANS
HIGHWAY
ISLANDIA,
CENTRAL ISLIP,
N.Y. 11722
(516) 582-8808

The People, etc., respondent,
v James J. Corrigan, Jr., Anthony Vespucci and Salvatore Avellino, Jr., appellants.
(Ind. No. 1475/84)

The People, etc., respondent,
v Arthur Romersa and Vito Biondo, appellants.
(Ind. No. 1476/84)

The People, etc., respondent,
v James J. Corrigan, Jr., appellant.
(Ind. No. 1477/84)

The People, etc., respondent,
v Arthur Romersa, appellant.
(Ind. No. 1479/84)

The People, etc., respondent,
v Peter Francis Finnerty, appellant.
(Ind. No. 1480/84).

December 30, 1988

APPEALS by (1) the defendant Anthony Vespucci from two judgments of the Country Court of Suffolk County (John Vaughn, J.), both rendered January 12, 1987, convicting him of coercion in the first degree under Indictment No. 2626/83, and conspiracy in the fifth degree under Indictment No. 1475/84, upon his pleas of guilty, and imposing sentences; (2) the defendant Sail Sanitation, Inc., from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 2626/83, upon its plea of guilty, and imposing sentence; (3) the defendant Sanicare

from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 2626/83, upon its plea of guilty, and imposing sentence; (4) the defendant Frank Rotundo from a judgment of the same court, rendered January 12, 1987, convicting him of attempted coercion in the first degree under Indictment No. 2626/83, upon his plea of guilty, and imposing sentence; (5) the defendant Wayside Carting, Inc., a/k/a Wayside Sanitation, from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 2626/83, upon its plea of guilty, and imposing sentence; (6) the defendant Thomas Ronga from a judgment of the same court, rendered January 12, 1987, convicting him of attempted coercion in the first degree under Indictment No. 1472/84, upon his plea of guilty, and imposing sentence; (7) the defendant Detail Carting Company from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 1472/84, upon its plea of guilty, and imposing sentence; (8) the defendant John Haynes from a judgment of the same court, rendered January 12, 1987, convicting him of attempted coercion in the first degree under Indictment No. 2626/83, upon his plea of guilty, and imposing sentence; (9) the defendant Standard Commercial Cartage, Inc., from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 2626/83, upon its plea of guilty, and imposing sentence; (10) the defendant Robert Schuman from a judgment of the same court, rendered January 12, 1987, convicting him of attempted coercion in

the first degree under Indictment No. 2626/83, upon his plea of guilty, and imposing sentence; (11) the defendant Charles Cannizzaro from a judgment of the same court, rendered January 12, 1987, convicting him of attempted coercion in the first degree under Indictment No. 2626/83, upon his plea of guilty, and imposing sentence; (12) the defendant MCM, d/b/a Island Carting Co., from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 2626/83, upon its plea of guilty, and imposing sentence; (13) the defendant Enviro, d/b/a Island Carting, from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 2626/83, upon its plea of guilty, and imposing sentence; (14) the defendant Salvatore Avellino from two judgments of the same court, both rendered January 12, 1987, convicting him of coercion in the first degree under Indictment No. 1472/84, and conspiracy in the fifth degree under Indictment No. 1475/84, upon his pleas of guilty, and imposing sentences; (15) the defendant Salem Sanitary Carting Corp. from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 1472/84, upon its plea of guilty, and imposing sentence; (16) the defendant Vincent Montesano from a judgment of the same court rendered January 12, 1987, convicting him of attempted coercion in the first degree under Indictment No. 2626/83, upon his plea of guilty, and imposing sentence; (17) the defendant Vinnie Monte's Waste Systems, Inc., from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second

degree under Indictment No. 2626/83, upon its plea of guilty, and imposing sentence; (18) the defendant Nicholas Ferrante from a judgment of the same court, rendered January 12, 1987, convicting him of coercion in the first degree under Indictment No. 2626/83, upon his plea of guilty, and imposing sentence; (19) the defendant Unique Sanitation from a judgment of the same court, rendered January 12, 1987, convicting it of attempted coercion in the second degree under Indictment No. 2626/83, upon its plea of guilty, and imposing sentence; (20) the defendant James J. Corrigan from three judgments of the same court, all rendered September 1, 1987, convicting him of conspiracy in the fifth degree under Indictment No. 1475/84, conspiracy in the fifth degree under Indictment No. 1477/84, and coercion in the first degree under Indictment No. 2626/83, upon his pleas of guilty, and imposing sentences; (21) the defendant Arthur Romersa from two judgments of the same court, both rendered September 10, 1987, convicting him of official misconduct under Indictment No. 1479/84, and attempted bribe receiving in the second degree under Indictment No. 1476/84, upon his pleas of guilty, and imposing sentences; (22) the defendant Vito Biondo from a judgment of the same court, rendered September 10, 1987, convicting him of attempted bribe receiving in the second degree under Indictment No. 1476/84, upon his plea of guilty, and imposing sentence; (23) the defendant Peter Francis Finnerty from a judgment of the same court, rendered June 17, 1987, convicting him of perjury, and criminal contempt (2 counts) under Indictment No. 1480/84, upon a jury verdict, and imposing sentence; and

(24) the defendant Jamaica Ash & Rubbish Removal Company from a judgment of the same court, rendered January 20, 1988, convicting it of conspiracy in the sixth degree under Indictment No. 1472/84, upon its plea of guilty, and imposing sentence. The appeals bring up for review the denial of the branches of the defendants' respective omnibus motions which were to suppress evidence obtained as a result of eavesdropping warrants.

Meyer, Suozzi, English & Klein, Mineola, N.Y. (Bernard S. Meyer and Andrew J. Turro of counsel), for all appellants other than Jamaica Ash and Rubbish Removal.

Stephen P. Scaring, P.C. Mineola, N.Y. (Laurie S. Hershey of counsel), for appellant Jamaica Ash and Rubbish Removal.

Ronald Goldstock, Deputy Attorney-General, White Plains, N.Y. (Martin Marcus, Steven Chananie and Vija Kemanis of counsel), for respondent.

KOOPER, J.

The principal issue to be resolved on appeal is whether the Director of the New York State Organized Crime Task Force has been permissibly empowered, in light of controlling Federal law, to apply for eavesdropping warrants pursuant to CPL 700.05(5). For the reasons that follow, we conclude that he is empowered to do so, and affirm the judgments of conviction appealed from.

I

The convictions from which the defendants appeals represent the culmination of a lengthy investigation by

the New York State Organized Crime Task Force (hereinafter the Task Force) into organized crime and corruption in the refuse collection industry in Nassau and Suffolk Counties. The principal investigative tools employed by the Task Force in securing evidence against the defendants, were eavesdropping warrants obtained upon applications executed by the Task Force Director, Ronald Goldstock, pursuant to authorization issued by Attorney-General Robert Abrams. After the completion of the investigation, the defendants were charged with a variety of crimes in several indictments. The County Court denied suppression of the conversations intercepted pursuant to the court authorized eavesdropping warrants.

On appeal, the defendants contend, *inter alia*, that CPL 700.05(5)[1], which confers wiretap applicant status upon the Director of the Task Force, is fatally inconsistent with the definitional provisions of, and underlying policy objectives sought to be achieved by, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USC §§ 2510-2520). They argue that the Federal statutory scheme, pursuant to which the "principal prosecuting attorney" of a state or a political subdivision thereof may

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[1] CPL 700.05(5), provides, in pertinent part, that the term "applicant" as employed in CPL article 70 "means a district attorney or the attorney general or if authorized by the attorney general, the deputy attorney general in charge of the organized crime task force". CPL 700.10(1) states that "[u]nder circumstances prescribed in this article, a justice may issue an eavesdropping warrant upon an ex parte application of an applicant who is authorized by law to investigate prosecute or participate in the prosecution of the particular designated offense which is the subject of the application".

apply for a wiretap warrant (*see*, 18 USC § 2516[2]), was intended to limit the class of eavesdropping applicants to officials who are "politically accountable", and that the Director of the Task Force is neither a "principal prosecuting attorney" nor a politically accountable official within the meaning of the Federal statute. We disagree.

II

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which constitutes the first comprehensive Federal legislation regulating electronic surveillance, prohibits – with limited exceptions – wiretapping and electronic surveillance unless accomplished pursuant to a court order requested by an authorized Federal or state law enforcement officer in connection with specified offenses (*see, United States v Giordano*, 416 US 505, 507; *United States v Chavez*, 416 US 562; *see generally*, Note, *Wiretapping and Electronic Surveillance – Title III of the Crime Control Act of 1968*, 23 Rutgers L. Rev 319). In enacting Title III, Congress "relied upon the broadest reach of its commerce clause powers, in large part to impose upon the states the minimum constitutional criteria for electronic surveillance legislation mandated by *Berger v New York* (388 US 41) and *Katz v United States* (389 US 347)" (*see, People v Shapiro*, 50 NY2d 747, 762-763). Although Title III "recognizes that a State is free to either adopt procedures and standards more restrictive than those imposed by the Federal act or, if it desires, to prohibit wiretapping within its borders altogether * * * under pre-emption principles, any State law drawn more broadly than title's standards runs afoul of the supremacy clause (US Const, art VI, cl 2; see Tribe,

American Constitutional Law, p 379)" (*see, People v Shapiro, supra,* at 763; *see also, People v Principe,* 65 NY2d 33, 36). The avowed legislative objective sought to be achieved through enactment of Title III was the combatting of organized crime, in respect to which the framers expressly characterized authorized electronic surveillance as an "indispensable" investigative tool (S Rep. No 1097, 90th Cong, 2d Sess, 1968, *reprinted in,* 1968 US Code, Cong & Admin News, 2112, 2161; hereinafter Senate Report). Although deeply concerned with the pervasive growth of organized crime (Senate Report, at 2154), the framers were equally intent upon "protect[ing] the privacy of wire and oral communications by confining State authorization for eavesdropping by wiretap to what in Congress' view are appropriate and compelling circumstances" (*People v Shapiro, supra,* at 763). Reflecting this concern is the Senate Report's recounting of the "dual purpose" of Title III as: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized" (Senate Report, at 2153). Commenting upon the paucity of state legislation in the area of wiretapping and the resultant lack of uniformity, the framers of Title III recognized the need – through uniform Federal legislation – to provide guidance and supervision to state and Federal law enforcement officers (Senate Report, at 2156).

As prescribed by the enabling provisions of the Federal statutory scheme, a state is empowered to legislatively designate specified officials as wiretap applicants, provided that the designation comports with

the restrictive parameters imposed by 18 USC § 2516(2).[2] Cognizant, however, of the disparity in nomenclature employed by the various States in describing their law enforcement personnel, the framers of Title III eschewed as impractical, any attempt to catalogue by name the state officials in whom the authority to make applications could be permissibly vested (*see, United States v Lanza*, 341 F Supp 405, 410; *State v Daniels*, 389 So 2d 631, 635 [Fla]). Instead, the framers implemented their intent to circumscribe the class of wiretap applicants by providing, in 18 USC § 2516(2), that "[t]he principal prosecuting attorney of any State * * * or political subdivision thereof * * * may apply [for an eavesdropping warrant]". The legislative history pertinent to 18 USC § 2516(2) is instructive, inasmuch as it counsels against a procrustean

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[2] 18 USC § 2516(2) provides: "The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana [sic] or other dangerous drugs or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses."

application of the term "principal prosecuting attorney", noting that, "[t]he important question * * * is not name but function" and advising that state law was to govern with respect to identity of an official as a "principal prosecuting attorney" (Senate Report, at 2187). The Senate report further discloses that the legislative purpose in limiting wiretap applicants to "principal prosecuting attorneys" was to "provide for the centralization of policy relating to statewide law enforcement" (Senate Report, at 2187) with respect to wiretapping by placing the "power to seek electronic surveillance orders * * * with some central, responsible authority in order to guard against violations of personal rights protected by the fourth and fourteenth amendments" (*State v Daniels, supra,* at 635; Senate Report, at 2187; see, United States v Giordano, 416 US 505, *supra*).

III

When viewed within the context of the foregoing Congressional objectives, and guided by the precept that function, not name is the governing criterion (Senate Report, at 2187; *Commonwealth v Vitello,* 367 Mass 224, 327 NE2d 838; *United States v Domme,* 753 F2d 950, 956, *cf., State v Chiarizio,* 8 Conn App 673, 514 A2d 370, 379), it is our conclusion that the Director of the Organized Crime Task Force has been permissibly designated as an authorized wiretap applicant within the purview of controlling Federal law. We begin by observing, as the Court of Appeals has instructed, that in determining whether a challenged state statute is preempted by Federal law, the inquiry must focus on "whether the State statute at issue

'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " (*see, People v Shapiro*, 50 NY2d 747, 763, *supra, quoting Hines v Davidowitz*, 312 US 52, 66-67; *see also, Michigan Canners & Freezers Assn. Agricultural Mktg. & Barg. Bd.*, 467 US 461, 469; *Capital Cities Cable v Crisp.*, 467 US 691, 699; *Silkwood v Kerr-McGee Corp.*, 464 US 238, 248). Contrary to the defendants' contentions, the designation of the Task Force Director as an authorized wiretap applicant poses no obstacle to the achievement of the framers' objectives in enacting 18 USC § 2516(2), i.e., "to provide for the centralization of policy relating to statewide law enforcement" with regard to electronic surveillance in a state official "responsive to the political process" (*see,* Senate Report, at 2187, 2185; *United States v Giordano, supra,* 416 US 505, 520).

In respect to the foregoing Congressional objectives, it is significant that the creation of the Organized Crime Tack Force has its genesis in Legislative findings which parallel, in many respects, those identified as significant by the framers of Title III; principal among them the desirability of ensuring uniformity and centralization of procedure as a means of enhancing the effectiveness of law enforcement personnel in combating organized crime (*see,* Legislative Findings, Executive Law § 70-a, L 1970, ch, 1003, § 1[3]; Senate Report, at 2187). In order to effectuate this intent the Legislature "established a task force within the Office of the Attorney-General, whose sole purpose would be to investigate and prosecute those involved in organized criminal activity" (*Matter of Susman v New York State Organized Crime Task Force,* 39 NY2d 227, 235 [Jason, J., dissenting]; *see also, Della Pietra v State*

of New York, 71 NY2d 792, 797; *People v Rallo*, 39 NY2d 217), to be headed by a single prosecuting attorney – selected jointly by the governor and the Attorney-General – upon whom statewide investigatory powers were conferred directly by statute and in whom was vested the authority to act with relative independence in conducting investigations within his jurisdiction (*see*, Executive Law § 70-a[2], [3], [4], [7]). The foregoing statutory scheme fully comports with the concepts of political accountability and centralization of procedure envisaged by the framers of Title III.

The defendants nevertheless contend that the Task Force Director cannot be characterized as a "principal prosecuting attorney" and further suggest that he is not sufficiently responsive to the political process within the intendment of Congress. The defendants' insistence upon a literal construction of the phrase "principal prosecuting attorney" unduly circumscribes its application (*see*, Senate Report, at 2187; *cf.*, *United States v Lanza*, 341 F Supp 405, 410, *supra*) and fails to meaningfully incorporate as guiding criteria the policy objectives sought to be achieved by Congress in utilizing the statutory term. In fashioning the enabling provisions through which its intent was to be imposed on the states (*see*, *People v Shapiro*, *supra*; Senate Report, at 2187) and emphasizing the importance of function over name. Congress sought to ensure that the individuals designated as eavesdropping applicants would be identifiable persons – as defined by state law – to whom "the lines of responsibility lead" (Senate Report, at 2185). The Task Force Director, a politically appointed prosecutor empowered to investigate and prosecute organized crime on a State-wide basis, is such a

person. While Congress may not – and, indeed, recognized that it could not – have anticipated with specificity the manner in which the various states would implement their eavesdropping statutes (Senate Report, at 2187; *United States v Lanza, supra*), New York's statutory scheme is within the intent and "spirit of the federal Act" (Bellacosa, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 700.05, at 462).

Nor have the defendants' conclusory allegations established that the statutory process by which the Task Force Director is appointed, undermines Congress's intent that an applicant be "responsive" to the political process. Although the defendants suggest that an eavesdropping applicant must be elected in order to satisfy the criterion that he be "responsive" to the political process, we discern no Federal mandate, either express or implied, which imposes such a requirement.[3] To so hold, would be to unreasonably foreclose the designation of qualified applicants in states whose systems may contemplate the appointment of prosecuting attorneys. Further, none of the authorities relied on by the defendants provides otherwise (*see, State v Farha*, 218 Kan 394, 544 P2d 341, *cert*

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[3] Significantly, as originally enacted, Title III listed as federal applicants, the Attorney-General and, when so designated by the Attorney-General, the nine Assistant Attorneys-General, none of whom are elected officials (*see*, 18 USC Former § 2516[1]). As one commentator has observed, several states – In addition to New York – have designated as applicants officials other than the Attorney-General and district attorneys (*see* Note, *Significant Development Electronic Surveillance – State Authorization of Wiretaps Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 56 B U L Rev 600, 604, n 32).

denied, 426 US 949; *Poore v State*, 39 Md App 44, 384 A2d 102; *State v Cocuzza*, 123 NJ Super 14, 301 A2d 204; *State v Frink*, 296 Minn 57, 206 NW2d 664; *see also*, *State v Daniels*, 389 So 2d 631 [Fla], *supra*). Rather, those cases involve either state statutes pursuant to which a broad class of Assistant State Attorneys were permitted to submit applications for eavesdropping warrants (*see, e.g., State v Farha, supra; State v Daniels*, 389 So2d 631 [Fla], *supra*), or circumstances in which the prosecuting authorities failed to comply with a state's own enabling provision with regard to the identity of those empowered to apply for eavesdropping warrants (*see e.g., State v Frink, supra; State v Cocuzza, supra*). No such infirmities are presented in the case at bar. Moreover, not only is the Task Force Director an identifiable, statutorily empowered prosecutor selected by the Governor and Attorney-General, his status as an eavesdropping applicant – paralleling the provisions of Title III applicable to Federal courts (*see*, 18 USC § 2516[1]) – is dependent upon the prior authorization of the Attorney-General, thereby further enhancing the express intent of Title III that "access to wiretap orders be strictly limited to certain designated public officials" (*see, People v Di Pasquale*, 47 NY2d 764, 767 [Wachtler, J., dissenting]; *see also*, Bellacosa, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 700.05, at 462).

In short, the Legislature's inclusion of the Task Force Director – a joint appointee of two highly visible elected officials – within the narrow class of those empowered to apply for eavesdropping warrants, transgresses neither of the two significant Federal concerns identified by the

framers of Title III as defining the parameters within which state enactments must be confined.

We have reviewed the defendants' remaining contentions and find them to be either lacking in merit or unpreserved for appellate review.

BRACKEN, J.P., WEINSTEIN and KUNZEMAN, JJ., concur.

ORDERED that the 29 judgments of the County Court, Suffolk County (Vaughn, J.), are affirmed and the cases of Peter Francis Finnerty, James Corrigan, Arthur Romersa and Vito Biondo are remitted to the County Court, Suffolk County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

Martin H. Brownstein
Clerk

December 30, 1988

APP V-1
18 U.S.C. § 2516(2)

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, and electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

TABLE OF STATE STATUTES DESIGNATING WIRETAP APPLICANTS

STATE – Alabama

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Alaska

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Arizona

STATUTE CITE – Ariz. Rev. State. Ann. §13-3010

AUTHORIZED APPLICANTS – county attorney or the attorney general or such prosecuting attorneys as they may designated in writing

STATE – Arkansas

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – California

STATUTE CITE – Cal. Penal Code §629

AUTHORIZED APPLICANTS – the attorney general or chief assistant attorney general, criminal law division, or a district attorney

STATE – Colorado

STATUTE CITE – Colo. Rev. Stat. §16-15-102

AUTHORIZED APPLICANTS – the attorney general or a district attorney

STATE – Connecticut

STATUTE CITE – Conn. Gen. Stat. §54-41b

AUTHORIZED APPLICANTS – the chief state's attorney or the state's attorney for the judicial district in which the interception is to be conducted

STATE – Delaware

STATUTE CITE – Del. Code Ann. Tit. 11 §1336(g)

AUTHORIZED APPLICANTS – the attorney general

STATE – Florida

STATUTE CITE – Fla. Stat. §934.07

AUTHORIZED APPLICANTS – the governor, the attorney general, the statewide prosecutor, or any state attorney for the county in which the interception is to be conducted

STATE – Georgia

STATUTE CITE – Ga. Code Ann. §16-11-64

AUTHORIZED APPLICANTS – the district attorney of the circuit wherein the device is to be physically placed or the attorney general

STATE – Hawaii

STATUTE CITE – Haw. Rev. Stat. §803-44

AUTHORIZED APPLICANTS – the attorney general or a designated deputy attorney general in the attorney general's general absence or incapacity, or the prosecuting attorney of each county, or a designated deputy prosecuting attorney in the prosecuting attorney's absence or incapacity

STATE – Idaho

STATUTE CITE – Idaho Code §18-6706

AUTHORIZED APPLICANTS – the prosecuting attorney of any county

STATE – Illinois

STATUTE CITE – Ill. Rev. Stat. 108A-1

AUTHORIZED APPLICANTS – the state's attorney

STATE – Indiana

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Iowa

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Kansas

STATUTE CITE – Kan. Stat. Ann. §22-2515

AUTHORIZED APPLICANTS – the attorney general, district attorney or county attorney

STATE – Kentucky

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Louisiana

STATUTE CITE – La. Rev. Stat. Ann. §15:1308

AUTHORIZED APPLICANTS – the attorney general, with the approval of the district attorney in whose district the interception shall take place, and the district attorney with the approval of the attorney general

STATE – Maine

STATUTE CITE – Me. Rev. Stat. Ann. Tit. 15, §712

AUTHORIZED APPLICANTS – prior authorization for the submission to judge by commissioner of corrections and the attorney general

STATE – Maryland

STATUTE CITE – Md. Cts. & Jud. Proc. Code Ann. §10-406

AUTHORIZED APPLICANTS – the attorney general, state prosecutor, or any state's attorney

STATE – Massachusetts

STATUTE CITE – Mass. Gen. L. ch.272 §99

AUTHORIZED APPLICANTS – the attorney general, any assistant attorney general specifically designated by the attorney general, the district attorney, or any district attorney specially designated by the district attorney

STATE – Michigan

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Minnesota

STATUTE CITE – Minn. Stat. Ann. §626A.05

AUTHORIZED APPLICANTS – the attorney general, or not more than one assistant or special assistant attorney general specifically designated by the attorney general, or a county attorney of any county, or not more than one assistant county attorney specifically designated by the county attorney

STATE – Mississipi

STATUTE CITE – Miss. Code Ann. §41-29-509

AUTHORIZED APPLICANTS – "prosecutor" (defined in 501 as the district attorney with jurisdiction in the county in which the interception is to take place)

STATE – Missouri

STATUTE CITE – Mo. Ann. Stat. §542.404 (Vernon)

AUTHORIZED APPLICANTS – the elected prosecuting attorney of the county with the written authorization of the attorney general

STATE – Montana

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Nebraska

STATUTE CITE – Neb. Rev. Stat. §86-703

AUTHORIZED APPLICANTS – the attorney general or any county attorney

STATE – Nevada

STATUTE CITE – Nev. Rev. Stat. §179.460

AUTHORIZED APPLICANTS – the attorney general or the district attorney of any county

STATE – New Hampshire

STATUTE CITE – N.H. Rev. Stat. Ann. 570-A:7

AUTHORIZED APPLICANTS – the attorney general, deputy attorney general, or a county attorney, upon the written approval of the attorney general or deputy attorney general

STATE – New Jersey

STATUTE CITE – N.J. Stat. Ann. §2A:156A-8

AUTHORIZED APPLICANTS – The attorney general, a county prosecutor or with the approval of the attorney general, except in certain cases, the chairman of the state commission of investigation when authorized by a majority of the members of that commission, or a person designated to act for such an official during his actual absence or disability

STATE – New Mexico

STATUTE CITE – N.M. Stat. Ann. §30-12-2

AUTHORIZED APPLICANTS – the attorney general or the district attorney of the county wherein intercept is to take place

STATE – New York

STATUTE CITE – N.Y. Crim. Proc. Law §700.05 (McKinney)

AUTHORIZED APPLICANTS – the district attorney or the attorney general or if authorized by the attorney general, the deputy attorney general in charge of the

organized crime task force. If a district attorney or the attorney general is actually absent or disabled, then that person designated to act for him

STATE – North Carolina

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – North Dakota

STATUTE CITE – N.D. Cent. Code §29-29.2-02

AUTHORIZED APPLICANTS – the attorney general, or an assistant attorney general, or a state's attorney, or an assistant state's attorney

STATE – Ohio

STATUTE CITE – Ohio Rev. Code Ann. §2933.53

AUTHORIZED APPLICANTS – the prosecuting attorney of each county, or an assistant to the prosecuting attorney who is specifically designated by the prosecuting attorney to exercise authority under this section. If the prosecuting attorney is the subject of an investigation, then by a special prosecutor appointed by the presiding judge of the Court of Appeals with jurisdiction over the county

STATE – Oklahoma

STATUTE CITE – Okla. Stat. Ann. Tit. 13, §176.7

AUTHORIZED APPLICANTS – the attorney general, upon application by a district attorney may make application to judge

STATE – Oregon

STATUTE CITE – Or. Rev. Stat. §133.724

AUTHORIZED APPLICANTS – the district attorney for the county in which the order is sought

STATE – Pennsylvania

STATUTE CITE – 18 Pa. Cons. Stat. Ann. §5704

AUTHORIZED APPLICANTS – the attorney general, or, during the absence or incapacity of the attorney general, a deputy attorney general designated in writing by the attorney general, or the district attorney or, during the absence or incapacity of the district attorney, and assistant district attorney designated in writing by the district attorney of the county wherein the interception is to be made

STATE – Rhode Island

STATUTE CITE – R.I. Gen. Laws §12-5.1-2

AUTHORIZED APPLICANTS – the attorney general, or an assistant attorney general specially designated by the attorney general

STATE – South Carolina

STATUTE CITE – S.C. Code Ann. §17-29-30

AUTHORIZED APPLICANTS – The attorney general or an assistant attorney general designated by the attorney general on behalf of the state, and a circuit solicitor or an assistant circuit solicitor designated by the solicitor on behalf of a political sub-division

STATE – South Dakota

STATUTE CITE – S.D. Codified Laws §23A-35A-3

AUTHORIZED APPLICANTS – the attorney general or any state's attorney

STATE – Tennessee

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Texas

STATUTE CITE – Tex. Code Crim. Roc. Ann. Art. 18.20

AUTHORIZED APPLICANTS – "prosecutor" (defined as district attorney, criminal district attorney, or county attorney performing duties of district attorney.)

STATE – Utah

STATUTE CITE – Utah Code Ann. §77-23a-8

AUTHORIZED APPLICANTS – attorney general or any assistant attorney general, or any county attorney or deputy county attorney

STATE – Vermont

STATUTE CITE – none enacted

AUTHORIZED APPLICANTS – N/A

STATE – Virginia

STATUTE CITE – Va. Code Ann. §19.2-66.

AUTHORIZED APPLICANTS – attorney general or chief deputy attorney general if the attorney general so designates in writing

STATE – Washington

STATUTE CITE – Wash. Rev. Code §9.73.040

AUTHORIZED APPLICANTS – state attorney general or any county prosecuting attorney

STATE – West Virginia

STATUTE CITE – W.V. Code §62-1D-8

AUTHORIZED APPLICANTS – the prosecuting attorney of any county or duly appointed special prosecutor

STATE – Wisconsin

STATUTE CITE – Wis. Stat. Ann. §968.28

AUTHORIZED APPLICANTS – the attorney general together with the district attorney of any county

STATE – Wyoming

STATUTE CITE – Wyo. Stat. §7-3-605

AUTHORIZED APPLICANTS – governor, attorney general or district attorney within his jurisdiction

REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS (WIRETAP REPORT)

For the period January 1, 1988
to December 31, 1988

(seal)

ADMINISTRATIVE OFFICE OF THE U.S. COURTS
WASHINGTON, DC 20544

TABLE B-1

STATE NEW YORK

REPORT BY JUDGES
OF COURT AUTHORIZED INTERCEPTS OF WIRE, ORAL, OR ELECTRONIC
COMMUNICATIONS PURSUANT TO TITLE 18 USC SEC 2519

A.O. NO.	AUTHORIZING OFFICIAL JUDGE	PROSECUTOR	OFFENSE SPECIFIED	INTERCEPT TYPE[1]	PLACE[2]	DATE OF APPLICATION AND (AMENDMENT)	AUTHORIZED LENGTH ORIGINAL ORDER (DAYS)	NUMBER OF EXTEN-SIONS	TOTAL LENGTH DAYS
STATE ATTORNEY GENERAL									
1	ALTMAN	ABRAMS	NARCOTICS	P	AO[5]	09-29-87	30	5	180
2	KANE	ABRAMS	NARCOTICS	P	SA	01-19-88	30	3	120
3	HUMPHREYS	ABRAMS	NARCOTICS	P	S	01-29-88	30	-	30
4	KUBINIEC	ABRAMS	GAMBLING	PM	ASO[6]	01-29-88	30	6	210
5	SULLIVAN	ABRAMS	BRIBERY	PM	SBO[7]	02-02-88 (03-22-88) (05-26-88)	30	4	142
6	O'DONNELL	ABRAMS	NARCOTICS	P	B	02-16-88	30	-	30
7	MARANO	ABRAMS	NARCOTICS	P	A	02-23-88	30	-	30
8	ALTMAN	ABRAMS	NARCOTICS	P	A	03-18-88	30	-	30
9	WHITE	ABRAMS	NARCOTICS	P	A	03-28-88	30	-	30
10	DEMAKOS	ABRAMS	NARCOTICS	P	S	04-12-88	30	1	60
11	ALTMAN	ABRAMS	NARCOTICS	P	S	04-13-88	30	1	60
12	ALTMAN	ABRAMS	NARCOTICS	P	S	04-13-88	30	1	60
13	WHITE	ABRAMS	NARCOTICS	P	A	04-27-88	30	1	60
14	MCCARTHY	ABRAMS	NARCOTICS	P	SA	05-06-88	30	1	60
15	ALTMAN	ABRAMS	NARCOTICS	P	O[5]	05-06-88	30	6	210
16	BERGIN	ABRAMS	NARCOTICS	P	SB	05-09-88	30	1	60
17	DEMAKOS	ABRAMS	NARCOTICS	P	S	05-26-88	30	-	30
18	ALTMAN	ABRAMS	NARCOTICS	P	S	07-06-88	30	3	120

[1] TYPE: P=PHONE WIRE; M=MICROPHONE-EAVESDROP; E=ELECTRONIC; NR; NOT REPORTED

[2] PLACE: S=SINGLE FAMILY DWELLING; A=APARTMENT; M=MULTIPLE DWELLING; B=BUSINESS; R=ROVING; O=OTHER

[3] NI IN THIS COLUMN INDICATES NEVER INSTALLED

[4] MOTIONS: G=GRANTED; D=DENIED; P=PENDING

[5] Pay phone

[6] Automobile

[7] Social club

TABLE B-1

STATE NEW YORK

REPORT BY JUDGES
OF COURT AUTHORIZED INTERCEPTS OF WIRE, ORAL, OR ELECTRONIC
COMMUNICATIONS PURSUANT TO TITLE 18 USC SEC 2519

A.O. NO.	AUTHORIZING OFFICIAL JUDGE	PROSECUTOR	OFFENSE SPECIFIED	INTERCEPT TYPE[1]	PLACE[2]	DATE OF APPLICATION AND (AMENDMENT)	AUTHORIZED LENGTH ORIGINAL ORDER (DAYS)	NUMBER OF EXTEN-SIONS	TOTAL LENGTH DAYS
STATE ATTORNEY GENERAL (CONT.)									
19	ALTMAN	ABRAMS	NARCOTICS	P	SA	07-19-88	30	1	60
20	DEMAKOS	ABRAMS	NARCOTICS	P	S	07-19-88	30	-	30
21	ALTMAN	ABRAMS	NARCOTICS	P	SA	07-19-88	30	1	60
22	BROWN	ABRAMS	BRIBERY	PM	O[6]	07-26-88	30	1	60
23	DEMAKOS	ABRAMS	NARCOTICS	P	S	08-23-88	30	-	30
24	SULLIVAN	ABRAMS	GAMBLING	PM	O[7]	09-07-88	29	1	57
25	MATHEWS	ABRAMS	NARCOTICS	P	S	09-07-88	30	-	30
26	MCLAUGHLIN	ABRAMS	GAMBLING	M	O[5]	09-14-88	2	-	2
27	MCLAUGHLIN	ABRAMS	GAMBLING	M	O[6]	10-28-88	30	1	60
28	EGAN	ABRAMS	NARCOTICS	PE	AO[6]	11-09-88	30	-	30

CALENDAR YEAR 1988

REPORT BY PROSECUTORS
OF COURT AUTHORIZED INTERCEPTS OF WIRE, ORAL, OR ELECTRONIC
COMMUNICATIONS PURSUANT TO TITLE 18 USC SEC 2519

			NUMBER OF			COSTS				NUMBER OF	
A.O. NO	NUMBER OF DAYS IN OPERATION[3]	AVERAGE INTER-CEPTS PER DAY	PERSONS INTER-CEPTED	INTER-CEPTS	INCRIM-INATING INTER-CEPTS	TOTAL COST $	OTHER THAN MAN-POWER $	AR-RESTS	TRIALS	MOTION TO SUPPRESS INTER-CEPTS[4]	PERSONS CON-VICTED
1	170	6	249	1101	456	821,000	37,800	-	-	- - -	-
2	105	2	53	249	157	118,500	10,500	-	-	- - -	-
3	29	9	19	260	218	24,775	1,500	-	-	- - -	-
4	203	33	224	6796	652	216,200	29,200	-	-	- - -	-
5	122	210	2000	25596	1696	752,720	100,400	-	-	- - -	-
6	24	2	10	49	26	7,870	1,500	-	-	- - -	-
7	INSTALLED BUT NOT USED			-	-	2100	2100	-	-	- - -	-
8	28	2	15	54	25	32,340	2,100	-	-	- - -	-
9	30	3	21	104	83	34,500	2,100	-	-	- - -	-
10	40	13	31	505	504	67,600	2,800	-	-	- - -	-
11	52	9	49	461	220	68,400	6,300	-	-	- - -	-
12	44	2	26	73	37	51,720	4,200	-	-	- - -	-
13	58	3	39	189	135	92,700	6,300	-	-	- - -	-
14	59	26	26	1530	122	89,000	4,200	-	-	- - -	-
15	184	0	17	87	51	217,620	18,900	-	-	- - -	-
16	57	1	14	60	55	93,900	8,400	-	-	- - -	-
17	29	10	27	297	291	43,860	2,100	-	-	- - -	-
18	101	5	63	479	276	121,080	12,000	-	-	- - -	-
19	60	5	23	308	141	76,800	12,000	-	-	- - -	-
20	16	8	8	121	113	24,090	1,050	-	-	- - -	-
21	60	5	23	308	-	76,800	12,000	-	-	- - -	-
22	21	7	61	156	-	8,820	4,320	1	-	- - -	-
23	8	1	2	11	11	17,840	560	-	-	- - -	-
24	50	45	150	2259	174	282,200	12,200	-	-	- - -	-

[1] TYPE: P=PHONE WIRE; M=MICROPHONE-EAVESDROP; E=ELECTRONIC; NR; NOT REPORTED

[2] PLACE: S=SINGLE FAMILY DWELLING; A=APARTMENT; M=MULTIPLE DWELLING; B=BUSINESS; R=ROVING; O=OTHER

[3] NI IN THIS COLUMN INDICATES NEVER INSTALLED

[4] MOTIONS: G=GRANTED; D=DENIED; P=PENDING

[5] Pay phone

[6] Automobile

[7] Social club

CALENDAR YEAR 1988

REPORT BY PROSECUTORS
OF COURT AUTHORIZED INTERCEPTS OF WIRE, ORAL, OR ELECTRONIC
COMMUNICATIONS PURSUANT TO TITLE 18 USC SEC 2519

			NUMBER OF			COSTS				NUMBER OF	
A.O. NO	NUMBER OF DAYS IN OPERATION[3]	AVERAGE INTER-CEPTS PER DAY	PERSONS INTER-CEPTED	INTER-CEPTS	INCRIM-INATING INTER-CEPTS	TOTAL COST $	OTHER THAN MAN-POWER $	AR-RESTS	TRIALS	MOTION TO SUPPRESS INTER-CEPTS[4]	PERSONS CON-VICTED
25	29	25	21	714	336	102,960	9,000	-	-	- - -	-
26	1	1	8	1	1	1,213	133	-	-	- - -	-
27	45	3	17	143	129	32,390	8,000	-	-	- - -	-
28	10	2	5	24	23	22,620	2,100	3	-	- - -	-

§ 700.05 Eavesdropping warrants; definitions of terms

As used in this article, the following terms have the following meanings:

1. "Eavesdropping" means "wiretapping" or "mechanical overhearing of conversation," as those terms are defined in section 250.00 of the penal law.

2. "Eavesdropping warrant" means an order of a justice authorizing or approving eavesdropping.

3. "Intercepted communication" means (a) a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by means of any instrument, device or equipment, or (b) a conversation or discussion which was intentionally overheard or recorded, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment. The term "contents," when used with respect to a communication, includes any information concerning the identity of the parties to such communications, and the existence, substance, purport, or meaning of that communication. The term "communication" includes conversation and discussion.

4. "Justice," except as otherwise provided herein, means any justice of an appellate division of the judicial department in which the eavesdropping warrant is to be executed, or any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed, or any county court judge of the county in which the eavesdropping warrant is to be executed.

5. "Applicant" means a district attorney or the attorney general or if authorized by the attorney general, the deputy attorney general in charge of the organized crime task force. If a district attorney or the attorney general is actually absent or disabled, the term "applicant" includes that person designated to act for him and perform his official function in and during his actual absence or disability.

6. "Law enforcement officer" means any public servant who is empowered by law to conduct an investigation of or to make an arrest for a designated offense, and any attorney authorized by law to prosecute or participate in the prosecution of a designated offense.

7. "Exigent circumstances" means conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

8. "Designated offense" means any one or more of the following crimes:

(a) A conspiracy to commit any offense enumerated in the following paragraphs of this subdivision, or an attempt to commit any felony enumerated in the following paragraphs of this subdivision which attempt would itself constitute a felony;

(b) Any of the following felonies: assault in the second degree as defined in section 120.05 of the penal law, assault in the first degree as defined in section 120.10

of the penal law, reckless endangerment in the first degree as defined in section 120.25 of the penal law, promoting a suicide attempt as defined in section 120.30 of the penal law, criminally negligent homicide as defined in section 125.10 of the penal law, manslaughter in the second degree as defined in section 125.15 of the penal law, manslaughter in the first degree as defined in section 125.20 of the penal law, murder as defined in section 125.25 of the penal law, abortion in the second degree as defined in section 125.40 of the penal law, abortion in the first degree as defined in section 125.45 of the penal law, rape in the third degree as defined in section 130.25 of the penal law, rape in the second degree as defined in section 130.30 of the penal law, rape in the first degree as defined in section 130.35 of the penal law, sodomy in the third degree as defined in section 130.40 of the penal law, sodomy in the second degree as defined in section 130.45 of the penal law, sodomy in the first degree as defined in section 130.50 of the penal law, sexual abuse in the first degree as defined in section 130.65 of the penal law, unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, kidnapping in the second degree as defined in section 135.20 of the penal law, kidnapping in the first degree as defined in section 135.25 of the penal law, custodial interference in the first degree as defined in section 135.50 of the penal law, coercion in the first degree as defined in section 135.65 of the penal law, criminal trespass in the first degree as defined in section 140.17 of the penal law, burglary in the third degree as defined in section 140.20 of the penal law, burglary in the second degree as defined in section 140.25 of the penal law, burglary in the first degree as defined in

section 140.30 of the penal law, criminal mischief in the third degree as defined in section 145.05 of the penal law, criminal mischief in the second degree as defined in section 145.10 of the penal law, criminal mischief in the first degree as defined in section 145.12 of the penal law, criminal tampering in the first degree as defined in section 145.20 of the penal law, arson in the fourth degree as defined in section 150.05 of the penal law, arson in the third degree as defined in section 150.10 of the penal law, arson in the second degree as defined in section 150.15 of the penal law, arson in the first degree as defined in section 150.20 of the penal law, grand larceny in the third degree as defined in section 155.30 of the penal law, grand larceny in the second degree as defined in section 155.35 of the penal law, grand larceny in the first degree as defined in section 155.40 of the penal law, robbery in the third degree as defined in section 160.05 of the penal law, robbery in the second degree as defined in section 160.10 of the penal law, robbery in the first degree as defined in section 160.15 of the penal law, unlawful use of secret scientific material as defined in section 165.07 of the penal law, criminal possession of stolen property in the second degree as defined in section 165.45 of the penal law, criminal possession of stolen property in the first degree as defined in section 165.50 of the penal law, forgery in the second degree as defined in section 170.10 of the penal law, forgery in the first degree as defined in section 170.15 of the penal law, criminal possession of a forged instrument in the second degree as defined in section 170.25 of the penal law, criminal possession of a forged instrument in the first degree as defined in section 170.30 of the penal law, criminal possession of forgery

devices as defined in section 170.40 of the penal law, falsifying business records in the first degree as defined in section 175.10 of the penal law, tampering with public records in the first degree as defined in section 175.25 of the penal law, offering a false instrument for filing in the first degree as defined in section 175.35 of the penal law, issuing a false certificate as defined in section 175.40 of the penal law, escape in the second degree as defined in section 205.10 of the penal law, escape in the first degree as defined in section 205.15 of the penal law, absconding from work release in the first degre[1] as defined in section 205.17 of the penal law, promoting prison contraband in the first degree as defined in section 205.25 of the penal law, hindering prosecution in the second degree as defined in section 205.60 of the penal law, hindering prosecution in the first degree as defined in section 205.65 of the penal law, and any of the felonies defined in sections 265.05, 265.10 or 265.35 of the penal law relating to firearms and other dangerous weapons;

(c) Criminal possession of a controlled substance in the seventh degree as defined in section 220.03 of the penal law, criminal possession of a controlled substance in the sixth degree as defined in section 220.05 of the penal law, criminal possession of a controlled substance in the fifth degree as defined in section 220.06 of the penal law, criminal possession of a controlled substance in the fourth degree as defined in section 220.09 of the penal law, criminal possession of a controlled substance in the third degree as defined in section 220.16 of the penal law, criminal possession of a controlled substance in the second degree as defined in section 220.18 of the penal law, criminal possession of a controlled substance

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[1] So in original. Probably should read "degree".

in the first degree as defined in section 220.21 of the penal law, criminal sale of a controlled substance in the fifth degree as defined in section 220.31 of the penal law, criminal sale of a controlled substance in the fourth degree as defined in section 220.34 of the penal law, criminal sale of a controlled substance in the third degree as defined in section 220.39 of the penal law, criminal sale of a controlled substance in the second degree as defined in section 220.41 of the penal law, criminal sale of a controlled substance in the first degree as defined in section 220.43 of the penal law, criminally possessing a hypodermic instrument as defined in section 220.45 of the penal law, criminal possession of marihuana in the first degree as defined in section 221.30 of the penal law, criminal sale of marihuana in the first degree as defined in section 221.55 of the penal law, promoting gambling in the second degree as defined in section 225.05 of the penal law, promoting gambling in the first degree as defined in section 225.10 of the penal law, possession of gambling records in the second degree as defined in section 225.15 of the penal law, possession of gambling records in the first degree as defined in section 225.20 of the penal law, and possession of a gambling device as defined in section 225.30 of the penal law;

(d) Commercial bribing, commercial bribe receiving, bribing a labor official, bribe receiving by a labor official, sports bribing and sports bribe receiving, as defined in article one hundred eighty of the penal law;

(e) Criminal usuary, as defined in article one hundred ninety of the penal law;

(f) Bribery in the second degree, bribery in the first degree, bribe receiving in the second degree, bribe receiving in the first degree, bribe giving for public office and bribe receiving for public office, as defined in article two hundred of the penal law;

(g) Bribing a witness, bribe receiving by a witness, bribing a juror and bribe receiving by a juror, as defined in article two hundred fifteen of the penal law;

(h) Promoting prostitution in the first degree, as defined in section 230.32 of the penal law, promoting prostitution in the second degree, as defined by subdivision one of section 230.30 of the penal law;

(i) Riot in the first degree and criminal anarchy, as defined in article two hundred forty of the penal law;

(j) Eavesdropping, as defined in article two hundred fifty of the penal law;

(k) Any of the acts designated as felonies in subdivisions two and four of section four hundred eight-one of the tax law, which section relates to penalties under the tax on cigarettes imposed by article twenty of such law, and any of the acts designated as felonies in subdivisions c and e of section D46-18.0 of the administrative code of the city of New York, which section relates to penalties under the cigarette tax imposed by title D of such code.

(*l*) Scheme to defraud in the first degree as defined in article one hundred ninety of the penal law.

(m) Any of the acts designated as felonies in section three hundred fifty-two-c of the general business law.

(n) Unlawful possession of hazardous wastes in the first degree as defined in section 71-2709 of the environmental conservation law.

(o) Unlawful disposal of hazardous wastes in the first degree as defined in section 71-2713 of the environmental conservation law.

(L.1970, c. 996, § 1; amended L.1972, c. 586, § 1; L.1973, c. 276, § 28; L.1973, c. 22, §§ 1, 2; L.1979, c. 410, § 28; L.1981, c. 565, § 1; L.1983, c. 105, § 1; L.1983, c. 646, § 1; L.1984, c. 919, § 1.)

NY Exec (McKinney's), section 70-a

EXECUTIVE LAW
CHAPTER EIGHTEEN OF THE CONSOLIDATED LAWS
ARTICLE 5 – DEPARTMENT OF LAW

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

§ 70-A. Statewide organized crime task force

1. There shall be established within the department of law a statewide organized crime task force which, pursuant to the provisions of this section, shall have the duty and power;

(a) To conduct investigations and prosecutions of organized crime activities carried on either between two or more counties of this state or between this state and another jurisdiction;

(b) To cooperate with and assist district attorneys and other local law enforcement officials in their efforts against organized crime.

2. Notwithstanding any other provision of law, the governor and the attorney general may, and without civil service examination, jointly appoint and employ, fix his compensation, and at pleasure remove, a deputy attorney general in charge of the organized crime task force. The attorney general may, and without civil service examination, appoint and employ, and at pleasure remove, such assistant deputies, accountants and other persons as he deems necessary, determine their duties and, with the approval of the governor, fix their compensation. The payments of salaries and compensation of such officers

and employees shall be in the same manner as is prescribed in subdivision eight of section sixty-three of this chapter.

3. The deputy attorney general in charge of the organized crime task force may request and shall receive from the division of state police, the state department of taxation and finance, the state department of labor, the temporary state commission of investigation, and from every department, division, board, bureau, commission or other agency of the state, or of any political subdivision thereof, cooperation and assistance in the performance of his duties. Such deputy attorney general may provide technical and other assistance to any district attorney or other local law enforcement official requesting such assistance in the investigation or prosecution of organized crime cases.

4. The deputy attorney general in charge of the organized crime task force is empowered to conduct hearings at any place within the state, to administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence he may deem relevant or material to an investigation. He is empowered to apply for search warrants pursuant to article six hundred ninety of the criminal procedure law, and, except in exigent circumstances, shall give prior notice of the application to the district attorney of the county in which such a warrant is to be executed, and in such circumstances, shall give such notice as soon thereafter as practicable; provided, however

that the failure to give notice of a search warrant application to a district attorney shall not be a ground to suppress the evidence seized in executing the warrant. He may designate an assistant to exercise any such powers. Every witness attending before such deputy attorney general or his assistant shall be examined privately and the particulars of such examination shall not be made public. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a class A misdemeanor.

5. Upon the application of the deputy attorney general in charge of the organized crime task force, the supreme court or a justice thereof may impound any exhibit marked in evidence in any hearing held in connection with an investigation conducted by such deputy attorney general, and may order such exhibit to be retained by, or delivered to and placed in the custody of, such deputy. When so impounded, such exhibit shall not be taken from the custody of such deputy except upon further order of the court or a justice thereof made upon five days notice to such deputy, or upon his application or with his consent.

6. In any hearing held in connection with an investigation conducted by the deputy attorney general in charge of the organized crime task force, the attorney general may confer immunity in accordance with the provisions of SECTION 50.20 of the criminal procedure

law, but only after affording the appropriate district attorney the opportunity to be heard in respect to any objections which he may have to the granting of such immunity.

7. With the approval of the governor and with the approval or upon the request of the appropriate district attorney, the deputy attorney general in charge of the organized crime task force, or one of his assistants, may attend in person any term of the county court or supreme court having appropriate jurisdiction, including an extraordinary special or trial term of the supreme court when one is appointed pursuant to section one hundred forty-nine of the judiciary law, or appear before the grand jury thereof, for the purpose of managing and conducting in such court or before such jury a criminal action or proceeding concerned with an offense where any conduct constituting or requisite to the completion of or in any other manner related to such offense occurred either in two or more counties of this state, or both within and outside this state. In such case, such deputy attorney general or his assistant so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform. In any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by such deputy attorney general.

(Added L.1970, c. 1003, s 2; amended L.1971, c. 1097, s 38; L.1982, c. 667, s 1; L.1983, c. 221, s 1.)

No. 89-1804 (2)

Supreme Court, U.S.
FILED
JUN 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

JAMES J. CORRIGAN, JR., SALVATORE AVELLINO, VITO BIONDO, CHARLES CANNIZZARO, NICHOLAS FERRANTE, PETER FINNERTY, JOHN HAYNES, VINCENT MONTESANO, ARTHUR ROMERSA, THOMAS RONGA, FRANCO ROTUNDO, ROBERT SCHUMAN AND ANTHONY VESPUCCI,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

STEVEN CHANANIE
Counsel of Record

RONALD GOLDSTOCK
Director, New York State
Organized Crime Task Force
Post Office Plaza
143 Grand Street
White Plains, New York 10601
(914) 422-8700

Attorney for the Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES J. CORRIGAN, JR., SALVATORE AVELLINO, VITO BIONDO, CHARLES CANNIZZARO, NICHOLAS FERRANTE, PETER FINNERTY, JOHN HAYNES, VINCENT MONTESANO, ARTHUR ROMERSA, THOMAS RONGA, FRANCO ROTUNDO, ROBERT SCHUMAN AND ANTHONY VESPUCCI,

Defendants-Petitioners,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This Brief is submitted in opposition to the defendants' petition for a Writ of Certiorari to the New York State Court of Appeals.

In January and September of 1987, each of the defendants were convicted in County Court, Suffolk County, New York, of various of the following crimes: Coercion in the

First Degree (New York Penal Law §135.65), Attempted Coercion in the First Degree (New York Penal Law §§110, 135.65), Conspiracy in the Fifth and Sixth Degrees (New York Penal Law §§105.00, 105.05), Attempted Bribe Receiving in the Second Degree (New York Penal Law §§110, 200.11), Official Misconduct (New York Penal Law §195.00), Perjury in the First Degree (New York Penal Law §210.15), and Contempt in the First Degree (New York Penal Law §215.51).[1]

These convictions arose out of an investigation conducted by the New York State Organized Crime Task Force (the "Task Force"), which documented the Lucchese and Gambino crime families' control of the carting industry on Long Island, and which included nearly thirteen months of court-authorized electronic surveillance. In September 1984, after the conclusion of the investigation, defendants were charged, along with numerous corporations, in several interrelated indictments with a variety of crimes, including Coercion, Bribery, and Conspiracy to commit those crimes, and violation of New York State's anti-trust statute.

In a written opinion issued on December 30, 1988, the Appellate Division of the New York Supreme Court, First

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[1] Most of the defendants pled guilty and were sentenced on January 12, 1987: Vespucci and Avellino pled to Coercion in the First Degree and Conspiracy in the Fifth Degree; and Rotundo, Ronga, Haynes, Schuman, Cannizzaro, and Montesano pled guilty to Attempted Coercion in the First Degree. Each of these defendants received 5 years probation, community service, and fines ranging from $4000 to $6000. In addition, Corrigan pled guilty to Coercion in the First Degree and two counts of Conspiracy in the Fifth Degree, and was sentenced on September 1, 1987, to concurrent 6 month prison terms and 5 years probation. Romersa and Biondo pled guilty to Attempted Bribe-Receiving in the Second Degree and were sentenced on September 10, 1987, to 6 month prison terms. Romersa also pled guilty to Official Misconduct and received an additional concurrent 6 month term. Both were re-sentenced on April 20, 1990, to serve only weekends in prison for 8 months. Finnerty was convicted after trial of Perjury in the First Degree and two counts of Contempt in the First Degree, and was sentenced on June 17, 1987 to a 6 month prison term and 5 years probation. He was re-sentenced on April 23, 1990 to 5 years probation with one year of electronic monitoring.

Department, unanimously affirmed the defendants' judgments of conviction. People v. Vespucci, 144 A.D.2d 48 (2d Dept. 1988). On February 17, 1989, leave was granted to the defendants to appeal to the New York State Court of Appeals. In a written opinion issued on February 15, 1990, that court also affirmed the judgments of conviction, with one Judge dissenting. People v. Vespucci, 75 N.Y.2d 434 (1990).

Defendant Corrigan thereafter moved before Justice Thurgood Marshall for a stay of execution of his judgment of conviction pending filing and review of this petition for a Writ of Certiorari. On May 17, 1990, Justice Marshall summarily denied Corrigan's motion.

STATUTES INVOLVED AND ISSUE RAISED

Federal law provides that only "[t]he principle prosecuting attorney of a state" or of "any political subdivision thereof" may be authorized by state law to apply for eavesdropping warrants. 18 U.S.C. §2516(2). The New York State Criminal Procedure Law ("CPL") expressly provides that, in addition to the State's Attorney General and the District Attorney of each of its counties, the Director of the Organized Crime Task Force is a proper applicant for eavesdropping warrants when so "authorized by the Attorney General." CPL 700.05(5).

In affirming defendants' judgments of conviction, the New York State Court of Appeals held that this statutory designation of the Director of the Task Force as an eavesdropping applicant is in full conformity with the mandate of 18 U.S.C. §2516(2). The issue defendants raise before this Court is whether the Court of Appeals' holding is correct.

THE OPINIONS BELOW

A. The Appellate Division's Opinion.

In unanimously affirming the defendants' judgments of conviction, the Appellate Division held that the designation of the Director of the Task Force as an eavesdropping applicant conformed to the requirements of federal law. People v. Vespucci, 144 A.D.2d at 50-51. After reviewing the provisions and purposes of the federal law (144 A.D.2d at 51-53), the Appellate Division found that, based on the functions he exercises, the Director of the Task Force is the kind of accountable and centralized public official envisioned by Congress when it mandated that only "principal prosecuting attorneys" could be authorized applicants for eavesdropping. 144 A.D.2d at 53-56.

The Appellate Division also held that the Director is an identifiable public figure, sufficiently responsive to the political process, and thus accountable for his official actions, as also required by federal law. 144 A.D.2d at 55-56. The Court specifically observed that the New York Legislature's purpose in creating the Task Force "parallel[ed], in many respects, those identified as significant by the framers of Title III; principal among them the desirability of ensuring uniformity and centralization of procedure as a means of enhancing the effectiveness of law enforcement personnel in combating organized crime." 144 A.D.2d at 54.

B. The Court of Appeals' Opinion.

In affirming the decision of the Appellate Division, the Court of Appeals also examined the "purpose and function" of the Task Force Director under State law, and held that he was "publicly accountable" as required by the federal statute. People v. Vespucci, 75 N.Y.2d at 439, 440. The Court also found that it would "ironically contradict the centralization objective" of the federal statute to hold that the Director was

not properly designated as an eavesdropping applicant, given that the Task Force's purpose under State law -- to insure centralization in the law enforcement effort against organized crime -- was "remarkably consonant" with the intent underlying the federal statute. 75 N.Y.2d at 439.

In addition, the Court specifically rejected the defense argument that, in enacting 18 U.S.C. §2516(2), Congress had intended to permit only one state official to apply for eavesdropping warrants. 75 N.Y.2d at 438-440. The Court reasoned that this provision was a "generic enabling statute" (75 N.Y.2d at 438), whose purpose is both to provide "'for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance,'" and to ensure that "'[s]hould abuses occur, the lines of responsibility lead to an identifiable person.'" 75 N.Y.2d at 439, 440, quoting Senate Report No. 1079, 90th Cong. 2d Sess., 1968, reprinted in 1968 U.S. Code Cong. & Admin. News at 2187, 2185. The Court concluded that the federal statute allowed for a "limited, high-level roster of applicants" when these Congressional concerns are met. 75 N.Y.2d at 439.

The Court also stressed that "under New York's unconventional scheme" the "Attorney General is not traditionally or by statutory empowerment a general prosecuting official;" and thus rejected the argument of the dissenting judge that allowing both the Attorney General and the Task Force Director to be applicants was "duplicative[]." Id. at 441.

Finally, the Court also rejected the argument that the New York State Attorney General's "blanket" authorization for the Director of the Task Force to act as an eavesdropping applicant -- as opposed to a specific authorization limited to a particular warrant -- constituted an "overbroad delegation" from the Attorney General. 75 N.Y.2d at 440-441. The Court found, in fact, that this authorization was not a delegation at all, since the Director's applicant authority, like his general investigative and prosecutorial powers, are not "derived" from the Attorney General's, but are "separately secured through a State legislative grant." 75 N.Y.2d at 441.

ARGUMENT

THE PETITION SHOULD BE DENIED: THE OPINION OF THE NEW YORK COURT OF APPEALS IS CLEARLY CORRECT; THE STATE AND FEDERAL CASES INTERPRETING 18 U.S.C. §2516(2) ARE IN HARMONY WITH THAT OPINION; AND THE ISSUE RAISED BY PETITIONERS IS NOT ONE OF NATIONAL IMPORTANCE.

A. Summary of Argument.

The defendants' petition should be denied. First, as the Court of Appeals correctly held, 18 U.S.C. §2516(2) is a "generic enabling statute" designed to centralize the authority to seek eavesdropping warrants in identifiable and accountable public officials. Because Congress was faced with 50 different states with potentially 50 different ways of allocating prosecutorial power in passing the statute, it left as a matter of state law which state officials might be designated as an eavesdropping applicant. Moreover, Congress did not forbid, and thus implicitly allowed, for designation of more than one applicant at the state or local level, so long as the Congressional concern for centralization and accountability was respected.

Under New York law, the Director of the Task Force is a publicly accountable government official who has the specific legislative mandate to conduct and co-ordinate the State's investigative and prosecutorial efforts against organized crime. He is thus precisely the type of public official Congress intended could be an eavesdropping applicant. The Court of Appeals therefore correctly found that his designation was in conformity with federal law.

Second, the opinion of the Court of Appeals is in harmony with those in other jurisdictions, and in no way conflicts

with the various state and federal cases cited by defendants which also interpret 18 U.S.C. §2516(2). Those cases do reach varying ultimate conclusions as to the propriety of the designation of the state applicants under consideration. This is not, however, because they rely on fundamentally different interpretations of federal law, but rather because they consistently applied the statute to different allocations of applicant authority, resulting in differing determinations of whether the Congressional policy set forth in that statute was being respected in each case. Thus, while the Congressional concern that applicant authority be centralized in high level accountability officials was not satisfied when state law permitted the unchecked delegation of an applicant's authority to one of a number of unspecified assistants (see, e.g., State v. Farha, 218 Kan. 394, 544 P.2d 341 [1975], cert. denied Kansas v. Farha, 426 U.S. 949[1976]), it was satisfied when the delegation was so circumscribed that the applicant had to personally review and approve each application by his designated subordinates. See United States v. Smith, 726 F.2d 852 (1st Cir. 1984); Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975). Alternatively, the Congressional concern is satisfied when, as here, there is no delegation at all, but instead two high-level officials are designated as applicants in their own right, each of whom is publicly responsible for his decisions and actions. See also United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); United States v. Domme, 753 F.2d 950 (11th Cir. 1985).

Finally, even if the Court desired to review the issue of when a state may designate more than one eavesdropping applicant at the state-wide level, this would be an inappropriate case in which to do so, given that it presents the issue in the context of the Task Force's unique jurisdiction and relationship under state law to the Attorney General, which is unlike that of any other public official in the country. See New York Executive Law §70-a (the Task Force's enabling legislation); People v. Vespucci, 75 N.Y.2d at 441.

B. The Opinion of the Court of Appeals was Correctly Decided.

First, the opinion of the Court of Appeals was correctly decided. Indeed, every state and federal court to address the propriety of the designation of the Task Force Director as an eavesdropping applicant has held that it is in conformity with the controlling federal statute, 18 U.S.C. §2516(2). People v. Vespucci, 144 A.D.2d 48 (2d Dept. 1988); People v. Sepulveda, A.D.2d (1st Dept. 1989) (affirming with no opinion), lv. denied, 150 A.D.2d 991 (1989); United States v. Vario, et al., (CR 88-001719, May 3, 1989, E.D.N.Y.).

1. Federal Law Allows for More Than One Applicant.

Defendants nonetheless argue that the Court of Appeals' opinion incorrectly interprets section 2516(2) as allowing, under limited circumstances, more than one eavesdropping applicant at a state-wide level. Specifically, defendants maintain that because the section provides only that "the" principal prosecuting attorney of the state may be so designated, not "a" or "any" prosecuting attorney, Congress meant to prohibit the states from conferring eavesdropping authority on more than one official (Defendants' Petition at 8-12, 21). Congress, however, clearly intended the phrase "the principal prosecuting attorney" to be construed generically, and it neither said nor meant that only one official at the state level could be so designated.

The federal eavesdropping statute is based on the policy announced by Congress that authority to apply for warrants be "centralize[d] in a publicly responsible official subject to the political process," thereby avoiding the "possibility that divergent [eavesdropping] practices might develop," and ensuring that "[s]hould abuses occur, the lines of responsibility lead to an identifiable person." Senate Report No. 1079, 90th Cong. 2d

Sess., 1968, reprinted in 1968 U.S. Code Cong. & Admin. News p. 2185. At the federal level, Congress "easily implemented" this policy by specifying in 18 U.S.C. §2516(1) those officials within the Department of Justice who may apply for warrants. See United States v. Giordano, 416 U.S. 505, 523 (1974). Such specificity was impossible with the States, however. As one court has explained, Congress was faced in enacting Section 2516(2) with "fifty state statutory schemes for parceling out the state's law enforcement powers." United States v. Lanza, 341 F.Supp. 405 (M.D. Fla. 1972). Thus, Congress more generally required in 18 U.S.C. §2516(2) that "[t]he principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof" may apply for an eavesdropping warrant, if "authorized by a statute of that State." 18 U.S.C. §2516(2). As a result, the section must be broadly "construed so as to permit each state to fit its scheme into the framework of the federal statute even though the distribution of power or the names of the officers may differ from state to state." United States v. Lanza, supra.

The commentary to Section 2516(2) contained in the Senate Report to the Omnibus Crime Control and Safe Streets Act includes a "comprehensive and in-depth analysis" of Title III designed "to make explicit congressional intent." 1968 U.S. Code Cong. & Admin. News p. 2177. The commentary stresses that who the principal prosecuting attorneys of a state are is "a question of State law," for which federal law requires only that respect be given to the announced Congressional policy that applicant authority be centralized in an accountable figure. Moreover, Congress made clear that in making this determination, "[t]he important question ... is not name but function." Id. at 2187.

In short, Congress intended the phrase "principal prosecuting attorney" to be interpreted broadly, so that the States would have wide latitude to decide, as a matter of their own law, who are their principal prosecuting attorneys. As the Appellate Division pointed out below, an "insistence upon a literal construction of the phrase 'principal prosecuting attorney'

unduly circumscribes its application and fails to meaningfully incorporate as guiding criteria the policy objectives sought to be achieved by Congress in utilizing the statutory term." People v. Vespucci, 144 A.D.2d at 55.

In this regard, the word "the" before "principal prosecuting attorney" merely reflects an expectation that, in the usual case, there would generally be one applicant for each political subdivision of the state. Defendants defy logic by stretching the use of these three letters into an expression of Congressional intent to require that there be only one principal prosecuting attorney. As the federal Rules of Construction state, "words importing the singular include and apply to several persons, parties, or things..." 1 U.S.C. §1.

Clearly, Congress believed that centralizing eavesdropping authority -- both federally and among the states -- in a publicly identifiable official "should go a long way toward guaranteeing that no abuses will happen." 1968 U.S. Code Cong. & Admin. News, p. 2185. Achieving such centralization and accountability, however, does not require that such eavesdropping authority be exercised by only one official. Federally, of course, there are a plethora of authorized applicants specified by Congress in 18 U.S.C. §2516(1); and -- absent a clear expression of Congressional intent to the contrary -- there is no reason that also having more than one applicant at the state level necessarily violates federal law.

Obviously, if there are many authorized applicants at the state level, then centralization and accountability may be diluted; and, as a result, the federal policy that applicant authority be centralized in an accountable public figure may be violated. This, however, is not such a case. As discussed more fully below, besides the Attorney General, the Task Force Director is the only other state official authorized to apply for eavesdropping warrants; and it is the Director who is charged, by statute, with conducting the statewide battle against organized crime -- one of the central purpose for which Congress intended eavesdropping to be used. Moreover, to whatever extent the existence of even two applicants at the state level might permit

divergence of policy regarding eavesdropping, or a diffusion of responsibility for it, the Attorney General's statutory right to grant, or withhold, the Director's "applicant" authority under CPL 700.05[5] provides a mechanism for ensuring that uniformity and accountability are maintained.

Defendant, however, notes that when Congress recently amended 18 U.S.C. §2516(1) to increase the number of federal officials within the Justice Department who could apply for eavesdropping warrants, it failed at the same time to also "broaden" 18 U.S.C. §2516(2) to allow more State officials to apply for warrants (Defendants' Petition at 13-16). He argues that this "failure" reflects a Congressional intent to strictly construe 2516(2), and somehow constitutes Congressional approval of those State and federal cases, decided prior to the amendments to Section 2516(1), which strictly limit when a principal prosecuting attorney of a State may delegate his authority to apply for warrants to his subordinates. See, e.g., United States v. Smith, 726 F.2d 852 (1st Cir. 1984); State v. Frink, 296 Minn. 57, 206 N.W.2d 664 (1973); State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975), cert. denied, Kansas v. Farha, 426 U.S. 949 (1976); Poore v. State, 39 Md. App. 44, 384 A.2d 103 (Ct of Special Appeals 1978).

Congress' expansion of the number of federal applicants in 2516(1), however, reflected Congress' conclusion that the designation of multiple high-level officials applicants in no way undermined the objective to centralize applicant authority in accountable officials. Notably, when Congress amended 18 U.S.C. §2516(1) in 1984 to add to the list of Justice Department officials who could be authorized to apply for eavesdropping warrants, it declared that such an expansion of the list merely permits "a broader sharing of the burden for reviewing potential surveillance cases, thereby promoting a more thorough consideration without diminishing the congressional intent to have a politically responsible high official personally approve surveillance applications ..." 1984 U.S. Code Cong. & Admin. News, p. 3535.

In light of this clear Congressional declaration that applicant authority can be given to a number of high-level officials without undermining its centralization policy, the Court of Appeals correctly interpreted the meaning of the phrase "principal prosecuting attorney" in 18 U.S.C. §2516(2) when it concluded that Congress "did not intend [a] straight-jacketed implementation of this important legislation," and that the designation of both the Attorney General and the Director of the Task Force as eavesdropping applicants is thus permissible. People v. Vespucci, 75 N.Y.2d at 439.

2. Under State Law, the Director Was Properly Designated as an Eavesdropping Applicant.

The Court of Appeals also properly found, based on an examination of the Director's function and "unique" relationship with the Attorney General under State law, that the Director was the type of centralized and accountable public official Congress intended could be an applicant.

First, the Court noted that the Director of the Task Force is an identifiable and accountable public figure. Indeed, he is not one of many unspecified assistant or deputy attorneys general; instead, his position was uniquely and explicitly established by the State Legislature in New York Executive Law §70-a, which provides that he is a joint appointee of the Governor and the Attorney General, and may be removed by them jointly. His status as an eavesdropping applicant is also specifically authorized by statute, and is further conditioned on authorization from the State Attorney General (CPL 700.05[5]), exactly as the applicant status of the federal Assistant Attorneys General is contingent, by statute, on prior authorization from the U.S. Attorney General. 18 U.S.C. §2516(2).

As a result, should abuses occur in the eavesdropping practices of the Task Force, the responsibility of the Director would be clear and remedies would exist within the political process: the Attorney General could withdraw authorization for the Director to apply for eavesdropping

warrants; the Governor and the Attorney General could remove him from office; or the Legislature itself could remove him from the list of designated applicants in CPL 700.05(5). Defendants are thus entirely without basis when they assert that the Director is an "unchecked" and "legally anonymous" official (Defendants' Petition at 21, 23).

Second, and contrary to defendants' assertion (Defendants' Petition at 17, 23), the designation of both the Director of the Task Force and the State Attorney General as eavesdropping applicants does not in any way "destroy[]" or "shatter" the Congressional intent to centralize in high level public figures the decision to seek authorization to conduct eavesdropping. To the contrary, as the Court of Appeals noted below, the Director's broad powers and responsibilities "insure centralization and consistency in the law enforcement effort against organized crime," the very effort for which court-ordered eavesdropping was explicitly designed. People v. Vespucci, 75 N.Y.2d at 440.

Specifically, the Legislative findings in support of Executive Law §70-a state that "an overly fragmented, uncoordinated approach" to organized crime control by local law enforcement agencies, which have "limited resources and restricted geographical jurisdiction," had been inadequate to successfully deal with the problem of organized crime in the state. N.Y.S Legis. Findings, L.1970, c. 1003, §1, reprinted in McKinney's Cons. Laws of New York, Executive Law §70-a, Book 18, p.143 (West. 1982). The Legislature thus created the Task Force and gave it -- and only it -- statewide jurisdiction to investigate and prosecute organized crime cases that cross county or state lines (Executive Law §70-a[1][a]), as well as a mandate to assist local prosecutors in their own organized crime efforts. Executive Law §70-a(1)(b). As a result, the Task Force can commence and maintain a "concerted and concentrated investigative and prosecutive effort to break the structure and power of organized crime." L.1970, c. 1003, §1. As the Appellate Division noted below, these findings "parallel, in many respects, those identified as significant by the framers of Title

III" regarding "the desirability of ensuring uniformity and centralization of" the law enforcement effort against organized crime. People v. Vespucci, 144 A.D.2d at 54.

Indeed, the one and only purpose of the Task Force is also "[t]he major purpose of Title III," that is, to "combat organized crime." 1968 U.S. Code Cong. & Admin. News p. 2157. As the Congressional findings in support of Title III explicitly state, electronic surveillance is "an indispensable aid" to the successful investigation and prosecution of organized crime (Id. p. 253, Public Law 90-351, §801[c]), which extracts an enormous economic, social, personal and political cost from our society. Id. at 2157-2159. Congress also noted in enacting Title III that New York faced one of the most aggravated organized crime problems in the nation. Id. at 2159. The Legislative Findings to Executive Law §70-a -- the Task Force's enabling legislation -- detail the exact same "corrosive influence" of organized crime activities on the life of the state;[2] and the New York eavesdropping statute was also explicitly enacted to provide law enforcement with what was recognized as the perhaps "most single effective weapon" against organized crime. 1968 McKinney's Session Laws, p. 3277 (Governor's Memorandum); see also People v. Vespucci, 144 A.D.2d at 52-53.

In short, the Director is the principal prosecuting attorney for organized crime statewide. Defendants are simply wrong when the assert that, as a matter of state law and practice, only the Attorney General is the principal prosecuting attorney (Defendants' Petition at 4, 27). The Director's "general authority" to investigate and prosecute organized crime and his "independent wiretap authority" are given directly to him by the Legislature, and not to the Attorney General, who is not even

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[2] Specifically, the Findings note that organized crime involves "the corruption of public officials, . . . draws millions of dollars from the state's economy, . . . corrupt[s] a variety of legitimate businesses and labor unions, which undermines free competition by coercive tactics, and which threatens the peace, security and general welfare of the people of the state." L. 1970 c. 1003, §1.

a "general prosecuting official" under New York law. People v. Vespucci, 75 N.Y.2d at 441. For instance, and despite defendants' assertion to the contrary, in 1988 the Task Force Director conducted all of the court-authorized eavesdropping on the state-wide level, and the Attorney General conducted none.[3]

Although Congress obviously could not have envisioned the precise, and rather complex, statutory scheme that created the Task Force (See Executive Law §70-a), given the Director's centralized and unique state-wide responsibility for the investigation and prosecution of organized crime, he is clearly the type of official that Congress envisioned as an authorized applicant. With his mandate to conduct his own prosecutions and investigations of organized crime statewide, as well as to assist local prosecutors, the Director is in fact better situated than any other official (including the Attorney General) to "avoid the possibility that divergent [eavesdropping] practices might develop" throughout the state. 1968 U.S. Code & Cong. Admin. News, p. 2185.

It would be ironic, indeed, if the head of the only agency with statewide responsibility for the investigation and prosecution of organized crime could have no ability to apply directly for eavesdropping warrants, which both Congress and the state have found to be so indispensable to the fight against organized crime.

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[3] Defendants' reliance on the federal eavesdropping Reports to argue that the Attorney General applied for 28 wiretap orders in 1988, while the Task Force Director applied for none, is based on a misreading of those Reports (Defendants' Petition at 27, n.42; Appendix at 66). In fact, it was the Director who actually applied for, obtained, and executed every one of these orders. Pursuant to CPL 700.05(5), the Attorney General merely gave his blanket authorization for these applications, and was for this reason listed by the Task Force and the issuing justices in their submissions to the Administrative Office of the U.S. Courts as the "authorizing official" in the federal Reports.

C. The Opinion of the Court of Appeals is in Harmony With Those in Other Jurisdictions.

The Court of Appeals' opinion is also not in "conflict with the decision of another state court of last resort or of a federal court of appeals" (U.S. S.Ct. Rule 17.1 [c]); and is in fact fully consistent with those few federal decisions which have addressed a similar issue. See United States v. Pacheco, 489 F.2d 554 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); United States v. Domme, 753 F.2d 950 (11th Cir. 1985); United States v. Lanza, 341 F.Supp 405 (M.D. Fla. 1972).

Defendant, however, argues that there is a proliferation of competing interpretations of the meaning and import of 18 U.S.C. §2516(2) that reflects a split of opinion between two Circuits and various State courts (Defendants' Petition at 16-25). In so arguing, they identify four groups of cases that they claim represent several different "schools of thought." Two of these groups include those cases, some of which were cited above, that review the propriety of a delegation from a statutorily designated State eavesdropping applicant to one of his legislatively unspecified subordinates; a third group includes only the Fifth Circuit decision in United States v. Pacheco, 489 F.2d 554, supra, which upheld the designation of the Governor of Florida as an applicant, even though the State Attorney General was also designated as one; and the final group includes only the State Court of Appeals' decision below (Defendants' Petition at 18-21). In fact, the holdings of these cases are in harmony with each other and with the Court of Appeals' holding in this case.

There is, of course, no conflict between this case and the two groups of cases identified by defendants which strictly interpret when a principal prosecuting attorney can delegate his applicant authority to his subordinates. These delegation cases hold either that true delegation in such situations is improper or that delegation is proper only when it is a delegation in form only, and in substance the authority of the "delegating" official is exercised by that official himself.

United States v. Smith, 726 F.2d 852 (1st Cir. 1984); State v. Frink, 296 Minn. 57, 206 N.W.2d 664 (1973); State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975), cert. denied, 426 U.S. 949 (1976); Poore v. State, 39 Md. App. 44, 384 A.2d 103 (Ct of Special Appeals 1978); State v. Cocuzza, 123 N.J. Super. 14, 301 A.2d 204 (1973). This case, by contrast, involves no delegation in form or substance. Instead, as noted above, and as the Court of Appeals below specifically held, the applicant authority of the Task Force Director was conferred directly upon him by statute and was not delegated to him by the State Attorney General. People v. Vespucci, 75 N.Y.2d at 441. The group of delegation cases defendants cite thus simply have no relation to, and are in no way inconsistent with, this case.

Moreover, the similarity between this case and Pacheco, the sole representative of defendants' third group of cases, is striking. Specifically, in Pacheco, the Fifth Circuit held that the Governor of Florida -- who is not even a prosecutor, and thus much less literally a "principal prosecuting attorney" -- was properly designated, along with the State Attorney General, as an eavesdropping applicant under Florida law. The Court held that the Governor's designation "comports fully with the federal requirements" by ensuring "the centralization of policy decisions [concerning the use of eavesdropping] at the highest practicable levels, preferably on a statewide basis." United States v. Pacheco, 489 F.2d at 562. That the Florida Legislature made both the Governor and the Attorney General authorized applicants on a statewide basis, and even though the Governor did not fit, in fact, within a restrictive reading of the phrase "principal prosecuting attorney," was not fatal to the Florida statute. See also United States v. Lanza, 341 F.Supp 405 (M.D. Fla. 1972). Similarly, ten years after Pacheco, the Attorney General of Florida was also held to be a properly designated applicant for eavesdropping warrants, even though he is accountable under Florida law to the Governor, who under the holding of Pacheco is himself a properly designated eavesdropping applicant. United States v. Domme, 753 F.2d 950 (11th Cir. 1985).

Far from representing a fragmentation in the law among federal and state courts, as defendants assert, the Florida decisions and this case present a consistent interpretation of Congress's intent to limit applicant authority to "the principal prosecuting attorney" of a state. All of these cases make clear that more than one state official may be designated as an eavesdropping applicant, so long as each official can be said to satisfy the Congressional requirement that applicant authority be centralized in publicly identifiable, high-level officials.

Similarly, the difference in outcome between the delegation cases on the one hand, and the Florida cases and this case on the other, arise not because they employ a fundamentally different interpretation of federal law, but because of the differing nature of the positions held by the officials exercising applicant authority in each case. The delegation cases defendant cites involved the unchecked delegation by an applicant to one of a number of unspecified assistants. See, e.g., State v. Farha, supra. While the question of how applicant authority may be delegated is as much a question of state law as is the question of who are the principal prosecuting attorneys of a State (1968 U.S. Code Cong. & Admin. News p. 2187), such delegation (like the designation of the State's prosecuting attorney) must conform to the Congressional requirement that eavesdropping applicants be high-level and accountable public officials. Because actual delegation to any of a large number of unspecified assistants would violate this policy, the delegation cases find in federal law a limitation upon such delegation, permitting it only in those circumstances in which the statutorily specified applicant personally reviews and approves the application -- that is, only when the applicant all but makes the application himself. See e.g., United States v. Smith, supra; Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975).

The restrictive interpretation in these delegation cases, however, is neither required for, nor inconsistent with, the Florida cases and this case, where instead of a delegation from a specified high-level official to an unspecified and low-level one, there is instead a direct statutory grant of authority to two high-

level officials, each of whom are readily identifiable and publicly accountable for their decisions and actions.

In short, the case law hardly reflects a "fragmentation" of the law or the existence of competing "schools of thought," but rather the consistent application of a single set of legal principles to different factual predicates. Defendants' dire warnings -- that a lack of guidance from this Court in how to interpret the federal provisions has allowed a "chaotic situation to develop" and that "[t]he entire congressional scheme is in immediate danger of unraveling" (Defendants' Petition at 6, 7) -- are without foundation.

D. The Opinion of the Court of Appeals Presents No Question of National Importance Justifying Review By The Court.

Finally, the Court of Appeals' opinion in this case presents no "important question of federal law which has not been, but should be, settled by" the Supreme Court, so as to justify granting a Writ of Certiorari. U.S. S.Ct. Rule 17.1(b). The abstract federal issue presented -- when can a State name two officials as "principal prosecuting attorneys" who may apply for eavesdropping warrants -- is one of narrow import. Although the related issue of when a properly designated State applicant may delegate his authority to a subordinate has been more widely litigated, the issue in this case has been litigated only in the Pacheco and Domme cases in Florida, and now in this case in New York. Notably, Certiorari was denied previously in the Pacheco case (421 U.S. 909 [1975]), and was denied even in one of the delegation cases (State v. Farha, 218 Kan. 394, 544 P.2d 341 [1975]).

Moreover, even if the issue were worthy of Supreme Court review, this would be an inappropriate case for it. As the State Court of Appeals noted, "under New York's unconventional scheme," the Attorney General is not even "traditionally or by statutory empowerment a general prosecuting official." People v. Vespucci, 75 N.Y.2d at 441. The position of

the Task Force Director, and his relationship to the Attorney General and other State and local officials are thus unlike that of any other public official in the country. Specifically, although the Director is denominated in the State's Executive Law a "Deputy Attorney General," he is in fact a joint appointee of both the Attorney General and the Governor, and can be removed only with the concurrence of both officials. Broad powers to conduct and coordinate the State's investigative and prosecutorial efforts against organized crime are given directly to him, rather than to the Attorney General, by legislative grant. Indeed, he appears in the grand jury and prosecutes a case with the approval of the Governor and the local District Attorney, and not that of the Attorney General. Once he receives that approval, he then supersedes the District Attorney and is given all of the District Attorney's powers, duties and responsibilities as to that case. Executive Law §70-a(7). No other State assigns statewide prosecutorial responsibilities in a similar manner.

Review by the Supreme Court in this case would, of necessity, require making determinations as to New York State's "unconventional" allocation of power and responsibility between the Task Force Director and the Attorney General (indeed, it would require resolving the very sort of issues Congress meant in Title III to leave as questions of state law), and would thus likely have little or no application to other jurisdictions in the nation.

CONCLUSION

The Petition for a Writ of Certiorari to the New York State Court of Appeals should be denied.

Respectfully submitted,

RONALD GOLDSTOCK
Director, New York State
Organized Crime Task Force
Post Office Plaza
143 Grand Street
White Plains, New York 10601
(914) 422-8700

STEVEN CHANANIE
Counsel of Record
Of Counsel

June 1990